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PARSING THE MEANING OF “ADVERSE EMPLOYMENT ACTION” IN TITLE VII DISPARATE TREATMENT, SEXUAL HARASSMENT, AND RETALIATION CLAIMS: WHAT SHOULD BE ACTIONABLE WRONGDOING?

ROSALIE BERGER LEVINSON*

I. Introduction

Title VII of the Civil Rights Act of 1964 prohibits disparate treatment on the basis of race, religion, sex, and national origin with regard to all terms and conditions of employment.¹ Title VII also bans retaliatory discrimination against those who complain of Title VII violations.² Despite the broad language in the text, the circuit courts are divided as to how much harm an employee must endure before claims of disparate treatment and retaliation are actionable.³ An increasingly complex body of law has developed that greatly

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1. 42 U.S.C. § 2000e-2(a)(1)-(2) (2000). Section 703(a) of the Civil Rights Act of 1964 provides:

It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255.

2. 42 U.S.C. § 2000e-3(a). Section 704(a) of the Civil Rights Act reads as follows:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

§ 704(a), 78 Stat. at 257.

3. See, for example, *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), pointing out that the circuits have aligned themselves with a broad, restrictive, or intermediate position as to what constitutes an adverse employment action in the context of retaliation claims brought under Title VII. *Id.* at 1240-42. In *Ray*, the Ninth Circuit ultimately joined the First, Seventh, Tenth, Eleventh, and D.C. Circuits in adopting an expansive view of the types of action that can be considered adverse employment actions. *Id.* at 1242-43. It cited the most restrictive view as that held by the Fifth and Eighth Circuits, which hold that only “ultimate employment actions”

restricts the types of discriminatory and retaliatory conduct that qualifies as adverse employment action. In part, the confusion arises because lower courts have indiscriminately borrowed from the U.S. Supreme Court's sexual harassment cases where "tangible harm" was made a prerequisite to imposing absolute vicarious liability on employers for the sexually harassing conduct of supervisors.⁴ The Court did not, however, make tangible harm an element of every disparate treatment case.⁵ It is well understood today that employers cannot base hiring, firing, promotion, or demotion decisions on an individual's race, gender, or religion. Unfortunately, when discrimination takes on more subtle, less tangible forms, courts have faltered in enforcing Title VII's goal of achieving equal employment opportunity.⁶

are actionable. *Id.* at 1242. It also cited the Second and Third Circuits as adopting an intermediate position requiring "a materially adverse change in the terms and conditions of employment." *Id.* (quoting *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997)). Several other courts have also recognized the division among the circuits. *See Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 445-46 (2d Cir. 1999) (discussing the disagreement among the circuits over how egregious an employer's conduct must be to give rise to a retaliation claim under Title VII); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (noting that whereas the Fifth and Eighth Circuits have required that the act of retaliation be an "ultimate employment action," the First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends "to adverse actions which fall short of ultimate employment decisions" and adopting the majority view). The cases discussed in this Article suggest that courts, even within the so-called "expansive" and "intermediate" circuits, are issuing decisions that reflect a restrictive view as to what harms are actionable both in the context of retaliation and disparate treatment claims. *See also* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1126 (1998) ("[T]here is a real and growing disarray concerning which improperly motivated employment decisions are legally actionable.").

4. The Supreme Court determined in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), that vicarious liability would be imposed whenever a supervisor sexually harassed an employee, but held that, in the absence of a "tangible employment action," the employer could assert an affirmative defense. *Id.* at 765; *see discussion infra* Part III.

5. *See discussion infra* Part III.

6. Because Title VII principles have been broadly applied to govern claims brought under other discrimination provisions, such as the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Fair Labor Standards Act (FLSA), and the Employee Retirement Income Security Act (ERISA), the implications of this development are very broad. *See, e.g., Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) (finding that courts may apply Title VII principles to the ADEA claims because "the substantive provisions of the ADEA 'were derived in *haec verba* from Title VII'") (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)); *see also Brown v. Brody*, 199 F.3d 446, 456 n.10 (D.C. Cir. 1999) (finding that the standards used to evaluate Title VII claims can be applied to claims under the ADA, ADEA, and ERISA). Each of these acts also bars retaliatory conduct. *See Fair Labor Standards Act (FLSA) of 1938*, 29 U.S.C. § 215(a)(3) (2000); *Age Discrimination in Employment Act of 1967 (ADEA)*, *id.* § 623(d); *Employee Retirement Income Security Act of 1974 (ERISA)*, *id.* § 1140; *Americans with Disabilities Act of 1990 (ADA)*, 42 U.S.C. § 12203(a) (2000). Other federal statutes also prohibit unlawful retaliation. *See National Labor Relations Act (NLRA)*,

The question of harm arises most frequently where an employer subjects an employee to noneconomic, or at least indirect, economic injury. Numerous decisions have rejected claims where the employer's discriminatory or retaliatory conduct consisted of (1) transfers, demotions, or changes in title or duties that did not involve the actual loss of salary or tangible job benefits;⁷

29 U.S.C. § 158(a)(4) (2000); Occupational Safety & Health Act of 1970 (OSHA), *id.* § 660(c); Family and Medical Leave Act of 1993 (FMLA), *id.* § 2615. Recent decisions under these acts reflect the same narrow interpretation of an adverse employment action. *See, e.g.,* Kersting v. Wal-Mart Stores, Inc., 250 F.3d 1109, 1118-19 (7th Cir. 2001) (finding that retaliation claims under the ADA consisting of a verbal and written warning did not constitute material adverse actions because the warnings and other workplace allegations did not result in any tangible job consequences); Tyler v. Ispat Inland, Inc., 245 F.3d 969, 972-73 (7th Cir. 2001) (holding that because an ADA plaintiff's salary and benefits remained the same after his transfer, plaintiff had not plead an actionable adverse employment action); Hunt v. City of Markham, 219 F.3d 649, 654 (7th Cir. 2000) (stating that the denial of a bonus is not an actionable adverse employment action under the ADEA because bonuses are "generally . . . sporadic, irregular, unpredictable, and wholly discretionary"); Shaner v. Synthes (USA), 204 F.3d 494, 505-06 (3d Cir. 2000) (finding that an employee who alleged that he was denied training, and endured harassment when his coworkers increased the temperature of the office to exacerbate his disability, suffered isolated incidents of harassment that did not rise to the level of an adverse employment action necessary to maintain a claim of either discrimination or retaliation); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 531-32 (10th Cir. 1998) (holding that a transfer that results in an increase in commuting time does not constitute an adverse employment action within the meaning of the ADEA); Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (stating that in an FLSA retaliation case it is essential "to show that the employer took a materially adverse employment action"); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (holding that, reassignment, without diminution in title, salary, or benefits, is not an adverse action under the ADEA because the change caused "no materially significant disadvantage"); Rodriguez v. Bd. of Educ., 620 F.2d 362, 366-67 (2d Cir. 1980) (affirming summary judgment in an ADEA case involving the transfer of a teacher from junior high school where he taught special education classes to mainstream high school where he taught the same classes because this was not an actionable adverse employment action). Note that these decisions are contrary to the EEOC Compliance Manual, discussed *infra* notes 78-84, which broadly defines the term "adverse action" in interpreting Title VII, the ADEA, the EPA, and the ADA. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NO. 915.003, COMPLIANCE MANUAL § 8-II(D), at 8-11 to -15 (1998), available at <http://www.eeoc.gov/docs/retal.pdf> [hereinafter COMPLIANCE MANUAL].

7. *White v. Burlington N. & Sante Fe Ry.*, 310 F.3d 443, 451 (6th Cir. 2002) (finding that a job transfer that involves heavy lifting and more physically demanding tasks is not an adverse employment action because employee was not "materially disadvantaged"); *vacated pending reh'g en banc*, 321 F.3d 1203 (6th Cir. 2003); *Jacob-Mua v. Veneman*, 289 F.3d 517, 521 (8th Cir. 2002) (failing to find that an involuntary transfer was an adverse employment action where "uncontroverted evidence" demonstrated that plaintiff's "position was marked for elimination in the ordinary course of business, he was offered a substitute position, and [plaintiff] did not suffer a loss in grade or pay when transferred"); *Longstreet v. Ill. Dep't of Corr.*, 276 F.3d 379, 383-84 (7th Cir. 2002) (finding that an employee suffering from multiple sclerosis failed to show that her transfer to different and allegedly more onerous duty station was adverse employment action where evidence suggested she was able to perform at the new station without

(2) negative evaluations, oral or written reprimands, or “unrealized” threats of termination or demotion;⁸ (3) temporary suspensions or demotions where

much difficulty and indeed worked there almost two years); *Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 86-87 (2d Cir. 2001) (holding that transfer of employee from one office to another and physical removal from the first office was not adverse employment action where “[t]here [was] no allegation that reassignment constituted a demotion”; further, “even assuming . . . physical removal was unprovoked . . . [the] allegation still fail[ed] because [employee did] not allege” that it had a tangible adverse effect on the terms and conditions of employment), *abrogated on other grounds by Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Stutler v. Ill. Dep’t of Corr.*, 263 F.3d 698, 702-04 (7th Cir. 2001) (finding that the lateral transfer of employee to another department following complaint about supervisor’s race discrimination was not an adverse employment action even if employee did not like the new job, where there was no evidence that the transfer decreased employee’s benefits or responsibilities in any way; to be actionable, adverse employment action must be a significant change in employment status or a decision causing a significant change in benefits); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (finding that the transfer of an employee to more stressful job did not qualify as adverse employment action because the employee failed to show that the transfer had a significant detrimental effect on him); *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 879 (5th Cir. 1999) (denying that a lateral transfer is an ultimate employment action necessary to state a claim for retaliation); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997) (finding that, “[h]owever unpalatable [it] may have been to [employee],” transfer to job in another town which did not entail a change in position, title, or salary, “did not rise to the level of an adverse employment action”).

8. *Longstreet*, 276 F.3d at 383-84 (holding that an employee’s “negative performance evaluations” and the requirement that she “substantiate . . . her absences from work [as] illness-related” were not “tangible job consequences and therefore . . . not adverse employment actions . . . under Title VII”); *Weeks*, 273 F.3d at 86-87 (holding that a female African-American employee, who received notice of discipline as well as a counseling memo for misconduct and incompetence for failing to have her handcuffs and weapon, failed to state a prima facie case that she suffered an adverse employment action even though similarly situated nonminority, nonfemale officers did not receive similar notices or memos; employee failed to describe any ramifications of the notice or memo or how either would create a materially adverse change in working conditions), *abrogated on other grounds by Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Weston v. Pennsylvania*, 251 F.3d 420, 431 (3d Cir. 2001) (finding that mere placement of two written reprimands in employee’s personnel file after he complained about sexual harassment was not actionable where employee “was not demoted in title, did not have his work schedule changed, was not reassigned to a different position or location,” and “was not denied any pay raise or promotion as a result of [the] reprimands”); *Krause v. City of La Crosse*, 246 F.3d 995, 1000-01 (7th Cir. 2001) (holding that a letter of reprimand alone is not an adverse employment action and that an employer’s decision to move employee from front office to back room cannot be considered adverse); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1240, 1246 (11th Cir. 2001) (finding that a negative job performance memoranda, which warned that continued misconduct would result in departmental action did not constitute adverse employment action even if employer retained memo in officer’s personnel file because officer did not lose pay or benefits, nor was there evidence this could cause foreseeable future economic injury); *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1112-13 (9th Cir. 2000) (holding that allegations that employer was “less civil, stared at [employee] in a

no change in benefits occurs or benefits are subsequently restored;⁹ (4)

hostile fashion,” and gave her a lower evaluation was insufficient to constitute adverse action where plaintiff was not subjected to any “‘intolerable’ act” that required her to quit); *Spears v. Mo. Dep’t of Corr. & Human Res.*, 210 F.3d 850, 853-54 (8th Cir. 2000) (finding that a lower performance evaluation from “highly successful” to “successful” was not an adverse employment action where there was no evidence that the plaintiff’s “[d]epartment subsequently used [this] evaluation to her detriment”; rather, plaintiff contended only that evaluation “‘demeaned her in the eyes of her coworkers’”); *Brown v. Brody*, 199 F.3d 446, 458 (D.C. Cir. 1999) (holding that formal criticism or poor performance evaluations are not necessarily adverse actions where neither affects employee’s salary); *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir. 1999) (holding that a negative performance evaluation is not actionable because if courts classify low evaluations or other supervisory actions that disappoint employees as adverse actions, “[p]aranoia in the workplace would replace the prima facie case as the basis for a Title VII cause of action”); *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (stating that lowering performance ratings did not establish a materially adverse employment action absent evidence that the scores had affected employee’s wages; further, threats made by supervisor were too ambiguous where they merely stated potential that employee would be transferred or terminated, and it was unclear whether supervisor even had authority to do so); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (finding that “‘unsubstantiated oral reprimands’ and ‘unnecessary derogatory comments’ . . . do not rise to the level of . . . [an] ‘adverse employment action’” under the retaliation provision); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997) (holding that threats to fire, reprimand, or give employee a “final warning” were not ultimate employment decisions).

9. *Stewart v. Evans*, 275 F.3d 1126, 1135-36 (D.C. Cir. 2002) (attempt to obstruct federal employee’s award nomination was not an adverse employment action because the employee eventually received the award; further, delay in plaintiff’s seeking appointment was not actionable retaliation since appointment was “not one of the terms, conditions, or privileges of employment contemplated by Title VII”); *Pennington v. Huntsville*, 261 F.3d 1262, 1267-68 (11th Cir. 2001) (holding that decisions to reprimand or transfer are not adverse employment actions if they are “rescinded before the employee suffers [any] tangible harm”); *Russell v. Principi*, 257 F.3d 815, 819-20 (D.C. Cir. 2001) (finding that “temporary exposure to a higher risk” of being laid off resulting from the receipt of a lower bonus was simply an “unrealized risk of a future adverse action” and was “too ephemeral to constitute an adverse employment action”); *Weston*, 251 F.3d at 431 (holding that two written reprimands placed in an officer’s personnel file, which were not “permanently affixed,” did not constitute an adverse employment action); *Amro v. Boeing Co.*, 232 F.3d 790, 797-98 (10th Cir. 2000) (finding that mere delay in granting the plaintiff’s desired transfer did not constitute an adverse employment action even though it meant plaintiff had to continue working under supervisor who allegedly harassed him because plaintiff failed to show any other negative or unfavorable effect of that delay); *Brooks v. City of San Mateo*, 229 F.3d 917, 929-30 (10th Cir. 2000) (finding that downgrading of plaintiff’s performance review from “satisfactory” to “needs improvement” “was not an adverse employment action because it was subject to modification by the city”; similarly, rescheduling employee to an unfavorable shift and denying her vacation preference were not actionable because decisions were not final and the “city accommodated [plaintiff’s] preferences by allowing her to switch shifts and vacation dates with other employees”); *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 712, 715 (8th Cir. 2000) (holding that although supervisor “told [employee] to pack her things and leave the building,” plaintiff did not suffer adverse

changes in work schedules, increased workloads, or the denial or elimination of secretarial or other assistance, equipment, or supplies — that is, employer actions that make the employee's job performance more difficult;¹⁰ (5)

employment action because she was informed the same day that she was not fired and temporary “[e]mployment actions which do not result in changes in pay, benefits, seniority, or responsibility are insufficient to sustain a retaliation claim”); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587-89 (11th Cir. 2000) (finding that the assignment of professor to teach more credit hours than other professors and to teach classes on three different campuses during one session was not adverse employment action because the assignment was a mistake and it was promptly corrected so that employee never suffered any actual consequences; further, threatened letters that were never actually written did not meet threshold level of substantiality necessary to be cognizable under the antiretaliation clause); *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 545-46 (6th Cir. 1999) (finding that a dean's decision to oppose a department's tenure recommendation did not constitute adverse employment action where faculty member had recourse to the university's internal grievance process and was given tenure from the date she originally should have received it absent the dean's misconduct; interlocutory decisions, even if they cause emotional distress, are not actionable under Title VII provided they do not affect the ultimate outcome); *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1019 (8th Cir. 1999) (holding that employer's attempt to overturn employee's unemployment benefits was not adverse employment action where the Iowa Civil Rights Commission “ultimately refused to entertain the appeal” since it was untimely, and thus employee could not show that “the company's action . . . inflicted any material employment disadvantage”); *Mungin v. Katten Muchin & Zabis*, 116 F.3d 1549, 1555 (D.C. Cir. 1997) (finding that, although a “no harm, no foul” rule affects only the question of remedy, not whether defendant is guilty of discrimination, some circuits have held that Congress did not intend “‘interlocutory or mediate decisions having no immediate effect upon employment . . . to fall [under] Title VII’”) (quoting *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc)).

10. *Traylor v. Brown*, 295 F.3d 783, 789 (7th Cir. 2002) (finding that an employer's refusal to allow the plaintiff to perform clerical and blacksmith duties did not constitute an adverse employment action where there was no effect on plaintiff's pay, her job responsibilities were not materially diminished, and plaintiff presented no evidence, other than her own conjecture, that the responsibilities she wanted to perform were important to achieve a higher position for which she was otherwise qualified); *Jacob-Mua*, 289 F.3d at 522 (holding that employer who gave employee work assignments that exceeded her abilities and job duties, and who denied employee adequate equipment, skills training, as well as a timely promotion, could not be charged with subjecting an employee to an adverse employment action where evidence showed that employee's grade and pay actually increased over the period of her employment and she was provided an intern to assist her with her new tasks); *Markel v. Bd. of Regents*, 276 F.3d 906, 911-12 (7th Cir. 2002) (finding that a female employee's claims that “she was denied ‘better’ equipment, the ability to travel and make presentations, and removed from certain accounts that caused her not to receive bonuses” did not constitute an actionable adverse employment action because the loss of services alone has never been held to be an adverse action); *Aquilino v. Univ. of Kan.*, 268 F.3d 930, 934-36 (10th Cir. 2001) (holding that neither university's decision to remove assistant professor from a graduate student's dissertation committee, its decision not to approve any of her numerous applications for appointment to the university's graduate faculty, nor its decision not to hire her as an adjunct research associate suffice as an adverse employment action for a retaliation claim because none of the alleged

company-tolerated harassment or hostility by coworkers or supervisors;¹¹ and (6) nonemployment related adverse action, such as the filing of specious union or criminal charges.¹² Often, the employee alleges a combination of these

actions was shown to have more than a de minimis effect on the employee's future employment opportunities; speculative harm regarding future employment prospects does not constitute an adverse employment action); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 691-92 (7th Cir. 2001) (finding that allegations that employer tried to force a custodian to relinquish her position, told male night custodians not to help her, gave her responsibilities beyond what was expected of male custodians, and intentionally interfered with her performance of work duties may have been harassing, but none of this conduct constituted a materially adverse change in working conditions sufficient to state a claim of disparate treatment); *Gorence v. Eagle Food Ctr., Inc.*, 242 F.3d 759, 766 (7th Cir. 2001) (holding that the loss of secretarial support and change in title from Human Relations Manager to Human Relations Specialist did not constitute an adverse employment action where such action did not involve the loss of pay or benefits); *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000) (fact that employer took a major account away from employee and prevented employees from taking breaks together did not amount to an adverse employment action required to establish a retaliation claim); *Kerns*, 178 F.3d at 1017 (holding that allegations that supervisor criticized the plaintiff, took away her discretionary authority, relocated her office, and ceased reimbursing her for work-related expenses were insufficient to constitute an adverse employment action where plaintiff failed to show that these actions had a formal effect on her employment status or potential for job advancement); *Watts v. Kroger Co.*, 170 F.3d 505, 511-12 (5th Cir. 1999) (finding that allegations that employer changed employee's work schedule and asked employee to perform new tasks after she filed a complaint about her supervisor did not rise to the level of an adverse employment action because neither the change in schedule nor new tasks affected employee's salary; there is not adverse employment action where pay, benefits, and level of responsibility remain the same).

11. *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465-66 (7th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002) (finding that supervisor's uniform inspection of female officer in an allegedly harassing and humiliating manner did not constitute adverse employment action absent evidence that the inspection resulted in reduction in pay or diminution in job responsibilities, or that harassing conduct was so severe as to be actionable harassment); *Rizzo v. Sheahan*, 266 F.3d 705, 717-18 (7th Cir. 2001) (finding that "[t]hreats, phone calls, and inconveniences that county employee allegedly faced after she filed sexual harassment complaint did not alter terms or conditions of her employment" sufficiently to meet "adverse employment" employment standard); *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969 (8th Cir. 1999) (holding that allegations of an employee's ostracism were not sufficient to rise to the level of an adverse employment action, even where employee was forced to request a transfer to avoid coworker retaliation, because employee suffered no diminution in title, salary, or benefits); *Allen v. Mich. Dep't of Corr.*, 165 F.3d 405, 410 (6th Cir. 1999) (finding that supervisor's alleged references to employee's use of racial epithets and employer's close monitoring of employee did not constitute adverse employment action).

12. *See Stewart*, 275 F.3d at 1135-36 (finding that federal employee who was made to appear to be involved in obstruction of justice did not state a claim for actionable retaliation where there was no evidence of any adverse employment action created by officials' misconduct); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 865 (8th Cir. 1997) (finding that because neither taking outside M.B.A. classes nor living with a direct supervisor are "benefits of employment," employer's alleged interference with both failed to demonstrate an adverse

actions, and courts nevertheless fail to examine the aggregate impact on the employee.¹³ When the motive for these actions is impermissible discrimination or retaliation, the letter and spirit of Title VII have been violated.¹⁴ The Supreme Court, in a case involving religious discrimination,

employment action); *Nelson v. Upsala Coll.*, 51 F.3d 383, 387 (3d Cir. 1995) ("Although '[t]he connection with employment need not necessarily be direct,' it does not further the purpose of Title VII to apply section 704 to conduct unrelated to an employment relationship.") (quoting *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980)) (alteration in original) (citation omitted); *Reed v. Shepard*, 939 F.2d 484, 493 (7th Cir. 1991) (finding that the disparate treatment provision in Title VII only reaches employment impairments and not events subsequent to and unrelated to plaintiff's employment).

13. See, e.g., *Stutler v. Ill. Dep't of Corr.*, 263 F.3d 698, 702-04 (7th Cir. 2001) (finding that plaintiff's alleged retaliatory lateral transfer to another office was not an adverse employment action despite her dislike of the new job because there was "no evidence that the transfer decreased her responsibilities or benefits in any way"; further, negative performance reviews, change in job title, increased commute, supervisor's sending of a disparaging e-mail to boss, telling employee that she had to go and that she should move her workspace to unfinished reception area, and requesting employee to return her key to supervisors, did not cumulatively create an adverse employment action for a retaliation claim where conduct did not materially harm employee; to be actionable, adverse employment action must be a significant change in employment status or a decision causing a significant change in benefits); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.*, 254 F.3d 644, 653-54 (7th Cir. 2001) (holding that employee's changing work schedule, secretly videotaping employee, issuing him a warning for having unauthorized people in the manager's office, and ordering him to spend more time with one of the discriminating officials did not constitute material adverse action for purposes of retaliation complaint); *Kerns*, 178 F.3d at 1017 (finding allegations that supervisor criticized plaintiff, took away her discretionary authority, relocated her office, and ceased reimbursing her for work-related costs were insufficient to constitute an adverse employment action where there was no showing that actions had a formal effect on plaintiff's employment status or potential for job advancement); *Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425, 427-28 (8th Cir. 1998) (affirming summary judgment for employer because employer's conduct in ordering employee to remove fan from her desk, changing her work hours, reprimanding her for a dress code violation, moving her parking space, reassigning her work station, and removing complimentary letters from her personnel file did not constitute adverse employment action); *Mattern*, 104 F.3d at 705-07 (finding that employee who alleged retaliation in the form of harassment by supervisors and coworkers, poor evaluations, and threats of termination failed to state a claim under Title VII); *Rabinovitz v. Pena*, 89 F.3d 482, 486-89 (7th Cir. 1996) (finding that retaliation consisting of lowered performance rating that resulted in the loss of a \$600 bonus, restrictions on speech with coworkers, implementation of a requirement that the employee report to supervisor upon leaving or returning to the office, loss of secretarial assistance for typing, and twenty-minute restriction on breaks was not actionable).

14. One of the purposes of the 1991 amendment to Title VII was to clarify that whenever an employee presents evidence that illegal motive played a part in an employment decision, liability should be found. See discussion of *Price Waterhouse*, *infra* notes 50-52 and accompanying text. In the context of a claim of discrimination under the ADA, the Eleventh Circuit reasoned that "[a]n artificially high threshold for what constitutes an adverse employment action would undermine the purposes of the statute by permitting discriminatory

explained that “[t]he emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.”¹⁵ If the action taken by the employer is truly inconsequential, it will be difficult for an employee to prove bias; however, where the evidence indicates that the employer is basing its decisions on impermissible discrimination or retaliation, liability should attach, and the severity of the action should be addressed solely at the remedy stage.

Title VII was amended by the Civil Rights Act of 1991 to create a damage remedy for the emotional distress caused by the intentionally discriminatory or retaliatory conduct of employers.¹⁶ Congress recognized that equal employment opportunity cannot be achieved where workers are subjected to different terms and conditions of employment, or face retaliatory treatment, but are remediless because they cannot prove out-of-pocket losses.¹⁷ A growing body of law has ignored the significance of this amendment.¹⁸ Indeed, many courts are sending a message to employers and their supervisors

actions to escape scrutiny.” *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1453 n.21 (11th Cir. 1998). The court reasoned that where the motive for the employer’s action is clearly the employee’s disability, dismissing a claim because the employer’s action doesn’t rise to the level of an adverse employment action “means that the action is not scrutinized for discrimination.” *Id.*

15. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977).

16. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e (2000)).

17. See H.R. REP. NO. 102-40(I), at 18, 65 (1991); 137 CONG. REC. S15388-01 (daily ed. Oct. 29, 1991) (statement of Sens. Daschle and Breaux); 137 CONG. REC. S18336-02 (daily ed. Nov. 26, 1991) (statement of Sen. Metzenbaum). See also *Schobert v. Illinois Department of Transportation*, 304 F.3d 725 (7th Cir. 2002), which held that plaintiffs may recover in a Title VII suit provided that they demonstrate injury, even if there are no monetary damages and only nominal compensation is awarded, because a civil rights plaintiff may act as a “private attorney general vindicating a policy that Congress considered of the highest importance.” *Id.* at 731 (quoting *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 873 n.13 (7th Cir. 1995)). Thus, employment discrimination “‘testers’ . . . [have] standing to sue . . . even if they [are] not interested in employment” because it is discrimination or unequal treatment that allows plaintiffs to recover. *Id.* (quoting *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 298 (7th Cir. 2000)).

18. It has been noted that the majority of decisions construing the “adverse action” element in retaliation claims have in fact used the stricter standard since the Civil Rights Act of 1991 was enacted. See Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 382 (1998). Prior to this law, the penalties were not substantial; thus, the issue did not draw the same attention. See *id.* at 379 n.32. See also cases *infra* note 28, which demonstrate this recent trend.

that they can discriminate with impunity, provided that their conduct does not reach a particularly egregious or materially adverse level. The circuits are divided as to whether any of the aforementioned types of misconduct are actionable under Title VII, and oftentimes the courts erroneously treat the question of harm the same, regardless of whether the case is one of disparate treatment or retaliation.¹⁹

Although the words are not found in the text of Title VII, several courts now require, as part of a *prima facie* case alleging disparate treatment, that an employee prove a *materially* adverse employment action,²⁰ a *tangible*

19. Decisions from several circuits cite a mixture of disparate treatment and retaliation cases. See, e.g., *Tarshis v. Riese Org.*, 211 F.3d 30, 38 (2d Cir. 2000) (citing demotion cases as illustrative of disparate treatment); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999) (citing disparate treatment cases in holding that an adverse employment action must affect terms, conditions, or privileges of employment to be actionable retaliation); *Hernandez-Torres v. Intercont'l Trading, Inc.*, 158 F.3d 43, 47 (1st Cir. 1998) (citing both retaliation and disparate treatment cases in determining that an increase in the amount of electronic messages containing onerous assignments and critical reports regarding employee's productivity was not an adverse employment action); *Munday v. Waste Mgmt. of N. Am.*, 126 F.3d 239, 243 (4th Cir. 1997) (holding that, for retaliation claims, the adverse action must affect terms, conditions, or benefits of employment, and instructing employees to ignore and spy on plaintiff was not an adverse employment action); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300-01 (3d Cir. 1997) (finding that adverse employment action required for a *prima facie* case of retaliation incorporates same requirement that conduct rise to the level of a violation of 42 U.S.C. § 2000e-2(a)(1) or (2), and oral reprimands and derogatory remarks do not rise to the level of an adverse employment action); *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997) (finding that even though the retaliation provision is not limited to "terms, conditions, or privileges" of employment, the court would incorporate this reference as a qualifier of retaliation claims because a broad interpretation may encourage employees who are "aggrieved by slights" to file "whimsical claims"); *Yerdon v. Henry*, 91 F.3d 370, 378 (2d Cir. 1996) (stating that for retaliation claims to be actionable, an adverse employment action must, as in the case of disparate treatment claims, affect "the terms, privileges, duration, or conditions of employment," and the action must be a materially adverse change in terms and conditions of employment) (quoting *Johnson v. Frank*, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993)). Decisions within the Seventh Circuit appear to be split on the question. Compare *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint."), with *Sweeney v. West*, 149 F.3d 550, 555 (7th Cir. 1998) (equating the adverse action requirement in retaliation with that required for claims brought under the disparate treatment provision), and *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996) (holding that an alleged adverse employment action in a retaliation case must materially change the terms and conditions of employment).

20. *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002). *Policastro* held that, to make out a *prima facie* case of discrimination, a plaintiff must allege "a 'materially adverse change in the terms or conditions of . . . employment.'" *Id.* (quoting *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996)). Further, "[r]eassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions."

employment action,²¹ or an *ultimate* employment action.²² These courts have

Id. The court also stated that “reassignment [will] rise[] to the level of a constructive discharge,” and thus be actionable, only if the conditions are “objectively intolerable to a reasonable person.” *Id.* Other cases have also addressed the requirement of a materially adverse employment action. See, e.g., *Traylor v. Brown*, 295 F.3d 783, 788-90 (7th Cir. 2002) (requiring that, to establish a prima facie case, a plaintiff must do more than show she was treated differently than other employees, but rather, must prove that “she suffered a materially adverse employment action . . . ‘more disruptive than a mere inconvenience or an alteration of job responsibilities’”) (quoting *Rabinovitz*, 89 F.3d at 488); *Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 86-87 (2d Cir. 2001) (affirming the district court’s granting of a motion to dismiss because alleged claims, which included filing a grievance, a notice of discipline and a counseling memo, and transferring plaintiff to another office failed to state a prima facie case that she suffered “material” harm to a term, condition or privilege of employment), *abrogated on other grounds* by *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 84 (2d Cir. 2001) (finding that allegations that the employee’s supervisor and several coworkers formed a clique and made her feel “out of the loop” fell “short of the sort of ‘materially adverse change in the terms and conditions of employment’ [actionable] under Title VII”) (quoting *Richardson*, 180 F.3d at 446); *Harlston v. McDonnell-Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (finding that “[c]hanges in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make out a prima facie case”); *Crady v. Liberty Nat’l Bank & Trust Co. of Ind.*, 993 F.2d 132, 135 (7th Cir. 1993) (finding that a “materially adverse employment action” is an element of a prima facie case under Title VII).

21. *Longstreet v. Ill. Dep’t of Corr.*, 276 F.3d 379, 383-84 (7th Cir. 2002) (holding that employee’s “negative performance evaluations and [the requirement that she] substantiate . . . her absences from work [as] illness-related” were not “tangible job consequences and therefore . . . not adverse employment actions . . . under Title VII”); *Oest v. Ill. Dep’t of Corr.*, 240 F.3d 605, 612-13 (7th Cir. 2001) (finding that neither unfavorable performance evaluations nor oral or written reprimands sufficiently implicated tangible job consequences, even though “each . . . reprimand brought [the plaintiff] closer to termination,” absent evidence of any “immediate consequence of the reprimands”); *Robinson*, 120 F.3d at 1300 (requiring that retaliation must be “tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment”).

22. *Soledad v. United States Dep’t of Treasury*, 304 F.3d 500, 507 (5th Cir. 2002) (stating that a “lateral transfer . . . with no change in pay is not the type of ultimate employment action necessary for an adverse employment action in a retaliation claim”) (citation omitted); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (finding that even though the “action complained of may have had a tangential effect on [plaintiff’s] employment, [the employer’s action must] rise to the level of an ultimate employment decision to be actionable under Title VII”); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (holding that only “ultimate employment decisions” are actionable); see also *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 691-92 (8th Cir. 2001) (holding that, even if employee received a poor performance review as a result of her report of sexual harassment, “a negative review is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient’s employment”); *Cross v. Cleaver*, 142 F.3d 1059, 1073 (8th Cir. 1998) (requiring that in order to make out a prima facie case of retaliation, the employee must suffer an “ultimate employment decision”). Note, however, that a Fourth Circuit

asserted that not every employment decision that arguably affects the terms and conditions of employment is actionable under Title VII.²³ They have

panel has asserted that "while the Eighth Circuit has ostensibly adopted the 'ultimate employment decision' standard, it has consistently applied a broader standard." *Von Gunten v. Maryland*, 243 F.3d 858, 864 (4th Cir. 2001). It would appear, however, that the most recent Eighth Circuit decisions lean towards the stricter standard.

The requirement of an ultimate employment decision first appeared in a Fourth Circuit case, *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981) (en banc), where a black postal employee brought a disparate treatment case alleging that the Postal Service's failure to include female or minority workers on his review committee, in violation of its own internal guidelines, gave rise to a prima facie Title VII violation. *Id.* at 228. The court explained that Title VII does not prohibit "interlocutory or mediate decisions having no immediate effect upon employment conditions," and that the composition of a review committee falls into this category. *Id.* at 233. Thus, the Fourth Circuit was describing a situation where the employer took no action against the plaintiff-employee. Further, the court was interpreting the unique statutory language in section 717 regarding federal employees, which forbids only discriminatory "personnel" actions. *Id.* The Fifth Circuit nonetheless adopted the *Page* "ultimate decision" language and applied it to a retaliation claim in *Dollis v. Reuben*, 77 F.3d 777 (5th Cir. 1995). *Dollis* found that retaliatory actions which restricted opportunities for promotion, prohibited the plaintiff from attending a training conference, and gave the plaintiff false information about aspects of her employment, including allocation of travel funds, did not give rise to an actionable retaliation claim. *Id.* at 781-82. The *Dollis* court reasoned that Title VII covers only ultimate employment decisions and not employer decisions that "arguably might have some tangential effect upon those ultimate decisions." *Id.*

Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), is viewed as the seminal case establishing that an ultimate employment decision is necessary in order for plaintiff to make out a prima facie case of retaliation. In that case the plaintiff complained that she was reprimanded for not being at her work station while she was at the Human Resources Department discussing her hostile work environment claim. *Id.* at 705. Additionally, coworkers, allegedly with the approval of Eastman supervisors, acted in a hostile fashion towards plaintiff, and she began to receive negative evaluations from supervisors who had previously praised her work, resulting in the loss of a pay increase. *Id.* The requirement that only ultimate employment decisions are cognizable under Title VII is supported by the Fifth Circuit's citation to earlier U.S. Supreme Court decisions that involved ultimate employment decisions; however, the Supreme Court never suggested that an "ultimate employment decision" was necessary. *Id.* at 710 (Dennis, J., dissenting); see also Ernest F. Lidge, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 363 (1999). Professor Lidge criticizes the Fourth Circuit's *Page* decision, that Title VII reaches only "ultimate employment actions." He asserts that the court's reliance on Supreme Court precedent is misdirected, *id.* at 361-64, and the fallacy is compounded when the Fifth Circuit, in *Mattern*, relies on *Page* to reach the same conclusion. *Id.* at 367 & n.201.

23. These courts have reasoned that simply because employer conduct makes an employee unhappy, this is not enough to assert a claim of adverse employment action; otherwise, any "chip-on-the-shoulder employee" could bring an action based on minor incidents. *Robinson*, 120 F.3d at 1300. The counterargument is that most employees would be unwilling to initiate action with the EEOC, subject themselves to investigation, and jeopardize their work status

indiscriminately borrowed terminology from the U.S. Supreme Court's sexual harassment cases to impose unwarranted obstacles on employees seeking to hold their employers liable.²⁴ Other courts have established broad mechanical rules as to what types of adverse action will and will not qualify, failing to recognize the fact-sensitive nature of the question.²⁵ Indeed, some circuits have required employees to demonstrate a "serious and material change" in terms and conditions of employment to survive summary judgment.²⁶ These

based on merely "minor inconveniences," which would net them nominal damages. Further, it is likely that employers can readily address "minor incidents" and remedy the problem in an expeditious fashion without judicial involvement.

24. See, e.g., *Watson v. Norton*, 10 Fed. Appx. 669, 678 (10th Cir. 2001) (referring to tangible employment action definition in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), in determining viability of a section 704 retaliation claim); *Evans v. City of Houston*, 246 F.3d 344, 353 (5th Cir. 2001) (citing *Ellerth* as a basis for finding adverse action under section 704); *Boone v. Goldin*, 178 F.3d 253, 255-56 (4th Cir. 1999) (analogizing to sexual harassment claims and citing to *Ellerth* in defining the adverse employment action requirement in a retaliation case). The requirement that an adverse employment action be "tangible" is borrowed from the *Faragher/Ellerth* mandate that courts may impose strict vicarious liability on an employer for the sexually harassing conduct of a supervisor only if the supervisor has subjected the employee to a tangible job action, characterized as an official act of the company. *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998); *Ellerth*, 524 U.S. at 761. The confusion is generated, perhaps, because the *Ellerth* court cited various disparate treatment cases in suggesting that a tangible job action should be "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," followed by a string of cites to the ADEA, the ADA, and Title VII disparate treatment cases. *Ellerth*, 524 U.S. at 761. This ignores, however, the *Ellerth* Court's conclusion that even if a tangible employment action is not present, a plaintiff may still prevail under the disparate treatment provision; the existence of the tangible employment action simply removes any affirmative defense on the part of the employer. *Id.* at 765.

25. See, e.g., *Stutler v. Ill. Dep't of Corr.*, 263 F.3d 698, 703 (7th Cir. 2001) (stating that negative performance evaluations, job title changes, greater travel distance to work and/or the loss of a telephone or workstation do not qualify, standing alone, as an adverse employment action). Compare the more expansive definition suggested by Judge Posner in *Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742 (7th Cir. 2002). Although rejecting claims involving a "purely subjective preference for one position over another," the judge recognized that the adverse action requirement is met whenever financial terms of employment are diminished, a transfer significantly reduces career prospects, the job is changed in some other way that injures the employee's career, or where working conditions are changed so as to cause a "significantly negative alteration in [the] workplace environment." *Id.* at 744-45.

26. See *Bell v. EPA*, 232 F.3d 546, 554-55 (7th Cir. 2000) (finding that allegations of demeaning assignments, verbal abuse, surveillance, diminished responsibilities, and being assigned tasks doomed to failure did not comprise material adverse actions sufficient to survive summary judgment); see also *Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425, 427-28 (8th Cir. 1998). In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court cautioned that the requirements of a prima facie case may vary depending on the context and that the elements

restrictions have also been imposed in retaliation cases, despite the fact that Title VII expressly prohibits all retaliatory discrimination, without reference to the terms and conditions of employment.²⁷ Further, this analysis ignores the different policy concerns reflected in the antidiscrimination and antiretaliation provisions, the latter having been enacted to protect those who invoke Title VII's enforcement machinery.²⁸ More generally, regardless of whether the employee alleges discrimination or retaliation, the "de minimis" wrongdoing notion is ill-founded. Even assuming that a disadvantageous personnel action inflicts only minimal harm, this goes to the issue of damages, not liability.

Despite the analytical confusion, the one emerging trend is that the lower courts are imposing a heavier burden on Title VII plaintiff-employees, even at the *prima facie* case stage.²⁹ This Article exposes the analytical confusion

"were 'never intended to be rigid, mechanized, or ritualistic.'" *Id.* at 512 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

27. Section 703 specifically limits claims to adverse action that involves "compensation, terms, conditions, or privileges of employment," whereas the plain language of section 704 prohibits any discrimination. *See supra* notes 1-2 and accompanying text. Nonetheless, many courts have superimposed the "terms and conditions" requirement on plaintiffs asserting a claim under the retaliation provision. *See, e.g., Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 87 (2d Cir. 2001) (finding that an employee fails to state a claim for retaliation where she does not allege what tangible adverse effect her transfer had on the terms and conditions of her employment), *abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Ribando v. United Airlines*, 200 F.3d 507, 511-12 (7th Cir. 1999) (stating that retaliatory conduct must be "materially" adverse to be actionable); *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (requiring that a plaintiff "identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII"); *Munday v. Waste Mgmt. of N. Am.*, 126 F.3d 239, 243 (4th Cir. 1997) (requiring that adverse action for retaliation claims must affect terms, conditions, or benefits of employment); *Robinson*, 120 F.3d at 1300-01 (finding that the "'adverse employment action' element of . . . a *prima facie* case [of retaliation] incorporates the same requirement, that the retaliatory conduct rise to the level of a violation" of section 703); *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997) (requiring that a plaintiff show "'a materially adverse change in the terms and conditions of employment'" for an actionable retaliation claim) (quoting *McKenney v. New York City Off-Track Betting Corp.*, 903 F. Supp. 619, 623 (S.D.N.Y. 1995)); *Yerdon v. Henry*, 91 F.3d 370, 378 (2d Cir. 1996) (holding that, as in the case of disparate treatment claims, retaliation claimants must demonstrate that the conduct affected "terms, privileges, duration, or conditions of employment," and the action must be a materially adverse change in terms and conditions of employment).

28. *See infra* notes 85-89 and accompanying text.

29. For example, the Seventh Circuit in *Knox v. Indiana*, 93 F.3d 1327 (7th Cir. 1996), held that demeaning statements made by other employees potentially qualify as adverse employment action. *Id.* at 1334. The court noted that adverse actions include

actions like moving [a] person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services . . . or cutting off challenging assignments. . . . The law deliberately does not take a "laundry list"

regarding what harms are actionable under Title VII, including the failure of courts to distinguish disparate treatment, sexual harassment, and retaliation claims. Most significantly, this Article seeks to critique the trend that has made it exceedingly difficult for employees to bring Title VII claims. Neither the statutory language of Title VII nor current Supreme Court precedent justifies the onerous burden that lower courts are imposing on employees who are subjected to discriminatory or retaliatory treatment. Part II explores discriminatory treatment cases and demonstrates how the Supreme Court's interpretation of the "terms and conditions" language in Title VII sexual harassment cases should be used in analyzing the harm question in the context of other disparate treatment cases. Part III demonstrates the failure of the lower courts to distinguish retaliation claims despite the fact that both the statutory language and the intended purpose of the provision demonstrate the need for a different and more liberal interpretation of the harm question, borrowing from traditional First Amendment retaliation cases. Part IV focuses on the different types of employment actions set forth in this

approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.

Id. In *Traylor v. Brown*, 295 F.3d 783 (7th Cir. 2002), the court ruled that to make out a prima facie case a plaintiff must do more than show that she was treated differently than other employees, but instead must prove that she suffered a "materially adverse employment action . . . 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Id.* at 788-90 (quoting *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996)). See also the Seventh Circuit cases discussed *supra* note 21, wherein the court required retaliatory conduct to be "tangible" in order to be actionable. Although the First Circuit has construed the adverse action element broadly, *see, e.g.,* *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994), the court more recently in *Randlett v. Shalala*, 118 F.3d 857 (1st Cir. 1997), determined that even though section 704(a) is not limited to "terms, conditions, or privileges of employment" like the antidiscrimination provision, the court would nonetheless incorporate by reference this restriction into the adverse action determination in a retaliation claim. *Id.* at 862. The court ultimately concluded that an employer's refusal to transfer an employee after the employee filed an EEOC complaint is not automatically outside of Title VII's protection. *Id.* Similarly, decisions from the D.C. Circuit appeared to broadly construe the adverse action requirement, at least in cases involving retaliation. *See, e.g.,* *Paquin v. Fed. Nat'l Mortgage Ass'n*, 119 F.3d 23, 32 (D.C. Cir. 1997) (finding that "withdrawal of a voluntary benefit . . . may constitute [an] adverse [employment] action"). However, recent decisions now mandate showing "materially adverse consequences affecting the terms, conditions, or privileges of . . . employment or . . . future employment opportunities" in order to state a claim. *E.g.,* *Brown v. Brody*, 199 F.3d 446, 456-57 (D.C. Cir. 1999) (relying on *Ellerth's* citation to decisions that applied a "materiality" threshold to determine whether the employment action constituted a tangible job action); *see also* *White*, *supra* note 3, at 1124 (noting the increased trend imposing heightened harm requirements and suggesting that this "may well be a reaction to the explosion of employment discrimination claims crowding the dockets of the federal courts").

Introduction and suggests the proper analysis using the principles identified in Parts II and III.

II. Discriminatory Treatment Claims

Section 703(a) of Title VII defines an “unlawful employment practice” as any activity by an employer that discriminates against an individual “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”³⁰ This text, with its broad reference to “terms, conditions, or privileges” of employment, would appear to encompass discriminatory transfers, negative evaluations, temporary suspensions or demotions, increased workloads, or the elimination of secretarial or other equipment, as well as company-tolerated harassment or hostility. The text does not restrict the Act to “tangible employment actions” or “ultimate employment actions.”

Further, lower courts that have imposed these onerous burdens on employees do not write on a clean slate. The U.S. Supreme Court, in the context of sexual harassment cases, has defined the phrase “compensation, terms, conditions, or privileges of employment” broadly to protect employees who are subjected to sexual harassment at work.³¹ In addition, Congress amended the Act in 1991 to recognize a remedy for emotional distress damages that occur even in the absence of a tangible or ultimate employment action.³²

It is likely that at least some of the confusion in the lower courts stems from a misreading of the Supreme Court’s analysis in its sexual harassment cases.³³ In *Burlington Industries, Inc. v. Ellerth*,³⁴ the Court distinguished situations where a supervisor’s harassment culminates in a “tangible” employment decision — where an employer faces absolute vicarious liability — from cases in which the employee is subjected to a hostile work environment — where

30. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255.

31. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

32. See *supra* notes 16-17 and accompanying text.

33. See, for example, *Brown*, where the court, in a case addressing disparate treatment and retaliation claims, borrowed *Ellerth*’s use of a “materiality” threshold. *Brown*, 199 F.3d at 456-57. The *Ellerth* Court used materiality to set a bar for sexual harassment claims, not to impose new restrictions on litigating other Title VII claims. The court concluded that an alleged retaliatory negative performance evaluation “may have been lower than normal, [but] it was not adverse in an absolute sense.” *Id.* at 458. This is in contrast to a prior decision wherein a court in the same circuit concluded that a negative performance evaluation in reprisal for engaging in EEO activity was actionable even absent a denial of a promotion or other economic harm. *Smith v. Sec’y of the Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981).

34. 524 U.S. 742 (1998).

an employer may assert an affirmative defense to liability.³⁵ In defining a “tangible” action for which absolute vicarious liability attaches, the Court stated that the plaintiff-employee must prove the supervisor’s “action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”³⁶ However, the Court recognized that even where the supervisor’s harassment does not culminate in the loss of one of these types of tangible job benefits, there is still liability, in fact vicarious liability, although this may be avoided if the employer establishes all of the elements of a rigorous affirmative defense.³⁷ The Court’s analysis in *Ellerth*, therefore, makes it clear that requiring the loss of “tangible job benefits”³⁸ or an “ultimate employment action”³⁹ to prove a Title VII violation is misguided.⁴⁰

35. *Id.* at 761-63.

36. *Id.* at 761-62. The difficulty in interpreting the level of harm necessary to create a prima facie case manifests itself not only in Title VII actions but also under other employment discrimination statutes. See, e.g., *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1241 (10th Cir. 2002) (opting for a case-by-case approach to determine whether a given employment action is sufficiently adverse to survive summary judgment in the context of claims brought under the ADEA and § 1981).

37. In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court ruled that although “[a]n employer is subject to vicarious liability . . . for [a] hostile [work] environment created by a supervisor,” an employer may raise an affirmative defense based on his exercise of reasonable care “to prevent and correct” harassing conduct and based on the reasonableness of the employee’s efforts to prevent harm. *Id.* at 807. The Court adopted the vicarious liability standard based on the theory that supervisors are “significantly aided by the agency relationship in committing the harassment.” *Id.* at 793, 801-03. On the other hand, the Court recognized that the affirmative defense would promote Title VII’s goal by encouraging employers to implement sexual harassment policies. *Id.* at 806-07. Further, requiring employees to utilize internal policies reflects Title VII’s mandate that victims of discrimination are under a statutory duty to mitigate damages. See 42 U.S.C. § 2000e-5(g), which provides that a back pay award shall be reduced by “amounts earnable with reasonable diligence.” See also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 233 (1982). Thus, a defending employer may raise an affirmative defense, subject to proof by a preponderance of the evidence under Federal Rule of Civil Procedure 8(c) which requires the employer to prove that “[it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior and . . . that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” FED. R. CIV. P. 8(c); *Faragher*, 524 U.S. at 807. See also *infra* Part III for a discussion of the application of this affirmative defense to various types of discriminatory and retaliatory conduct.

38. *Ellerth*, 524 U.S. at 742.

39. *Ray v. Henderson*, 217 F.3d 1234, 1242 (9th Cir. 2000).

40. The *Ray* court noted that the tangible employment actions listed in *Ellerth* focused on the type of actions that “would subject [an] employer to vicarious liability for [unlawful] harassment,” and it subsequently “reject[ed] the contention” that *Ellerth* established a standard

A careful reading of the Supreme Court's sexual harassment decisions provides important lessons for assessing the harm question in Title VII actions. First, in cases not involving tangible job benefits, the Supreme Court has required that the harassment be objectively as well as subjectively sufficient to alter the "terms and conditions of employment," but it has also stressed that courts must look to the totality of circumstances in assessing the work environment.⁴¹ Second, the Court has recognized the fact-specific nature of the harm question, leading several lower courts to assert that, in the gray area, the issue should be determined by a jury.⁴² Third, the Supreme Court has

for what constitutes an adverse action in a retaliation case. *Id.* at 1242 n.5.

41. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."). This principle was cited by the U.S. Supreme Court in *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001), and in *Faragher*, 524 U.S. at 787. See also *Cerros v. Steel Tech., Inc.*, 288 F.3d 1040, 1046-47 (7th Cir. 2002) (holding that the district court erred in failing to consider the totality of the circumstances in assessing an employee's hostile work environment claim); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002) (finding that the district court erred in focusing on a single factor, namely coworker harassment); *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 195-96 (4th Cir. 2000) (holding that the district court improperly failed to look at the totality of circumstances in assessing whether harassment was sufficiently severe or pervasive to create a hostile work environment); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562-64 (6th Cir. 1999) (the totality-of-the-circumstances test requires the court to consider the total harassment by all perpetrators when determining whether a hostile work environment exists, and, the district court erred in failing to recognize that the impact of separate incidents may accumulate and thereby create a hostile work environment).

42. See, e.g., *McCowan v. All Star Maint., Inc.*, 273 F.3d 917, 923-24 (10th Cir. 2001) (finding that the determination of whether a hostile work environment exists is particularly unsuited for summary judgment because it raises a fact question and the trier of fact must examine the totality of circumstances); *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 75 (2d Cir. 2001) (holding that "[s]ummary judgment is appropriate only if it can 'be concluded as a matter of law that no rational juror could view [the defendant's conduct] as . . . an intolerable alteration of [the plaintiff's] working conditions'") (quoting *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000)) (alteration in original); *Gallagher v. Delaney*, 139 F.3d 338, 342-43 (2d Cir. 1998) (finding that because a federal judge is not in the best position to interpret the "subtle sexual dynamics of the workplace," juries, not judges, should decide what is and is not proper in the workplace). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the U.S. Supreme Court, in the context of an ADEA case, admonished an appellate court not to second guess jury verdicts and not to substitute its judgment concerning the weight of the evidence for that of the jury. It emphasized that these same rules apply at the summary judgment stage. *Id.* at 135; see also *Conner* 227 F.3d at 199-200 (holding that the district court improperly intruded into the jury's province by reversing their verdict, especially in light of "the legal principle that whether the harassment was sufficiently severe or pervasive to create a hostile work environment is 'quintessentially a question of fact' for the jury") (quoting *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 243 (4th Cir. 2000)); *Bailey v. Runyon*, 167 F.3d 466, 469 (8th Cir. 1999) (finding that "because [t]here is no bright line between sexual harassment and merely unpleasant conduct[,] . . . a jury's decision must generally stand") (quoting

acknowledged that even in those cases where “tangible” action is needed to impose absolute vicarious liability on an employer for its supervisor’s conduct, the injury need not necessarily be economic.⁴³

These same principles apply in any disparate treatment case because courts are interpreting the same “terms and conditions of employment” language of Title VII that formed the basis for the Supreme Court’s sexual harassment decisions. To require an ultimate employment action or tangible job loss or economic injury to establish a *prima facie* case of discrimination is error. In *Meritor Savings Bank v. Vinson*,⁴⁴ the Supreme Court rejected the notion that Title VII only applied to economic or tangible barriers. The Court stated that

Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997)) (alteration in original).

43. Although in *Ellerth* the Court acknowledged that in most cases tangible job action must inflict “direct economic harm,” the Court did not make this a mandatory prerequisite. *Ellerth*, 524 U.S. at 761; see *Jin v. Metro. Life Ins. Co.*, 295 F.3d 335, 346-48 (2d Cir. 2002) (finding that *Faragher* and *Ellerth* did not mandate direct economic harm as a basis for finding a tangible employment action, and thus an employer may be automatically liable where he bases decisions affecting terms and conditions of a subordinate’s employment on the subordinate’s submission to sexual demands); *Green v. Adm’rs of Tulane Educ. Fund*, 284 F.3d 642, 654-55 (5th Cir. 2002) (stating that although “*Ellerth* acknowledged that in most cases a tangible employment action inflicts economic harm,” it is not required in all cases, and here it sufficed that the employee was demoted, even though the demotion was not accompanied by a change in pay, benefits, or prestige); *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 513 (11th Cir. 2000) (finding that, although economic harm is dispositive of the tangible employment action question, in the absence of economic harm, the factfinder must assess whether a reasonable person would have found the transfer to constitute a tangible employment action); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153-54 (3d Cir. 1999) (“Although direct economic harm is an important indicator of a tangible adverse employment action, it is not the *sine qua non*. If an employer’s act substantially decreases an employee’s earning potential and causes significant disruption in his or her working conditions, a tangible adverse employment action may be found” for purposes of Title VII.). On the other hand, some courts have adopted a more stringent interpretation of a tangible employment action. See Susan Grover, *After Ellerth: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809 (2002) (arguing that lower courts have defined the term tangible employment action too narrowly, thus allowing defendants to invoke the affirmative defense contrary to the purposes of Title VII). The author notes that the heightened injury requirements discussed in this Article, namely the need for material adversity or an ultimate employment action, have sometimes been used to interpret the tangible employment action requirement of *Ellerth*. *Id.* at 826-27. See also decisions holding that an employee cannot satisfy the adverse employment requirement by alleging “constructive discharge,” this is, that the employer has made working conditions so intolerable that the employee feels compelled to resign. The circuits are split on the question of whether a “constructive discharge” constitutes a “tangible action,” thereby precluding an employer from raising an affirmative defense to a sexual harassment action. See *Suders v. Easton*, 325 F.3d 432, 452-54 (3d Cir. 2003), *cert. granted*, 124 S. Ct. 803 (2003); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003).

44. 477 U.S. 57 (1986).

“the language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”⁴⁵ If a sexually harassing work environment constitutes discrimination with regard to the terms and conditions of employment, it is equally clear that other types of employment action, including transfers, negative evaluations, temporary suspensions, or changes in workload or work scheduling, should be actionable under Title VII if motivated by impermissible animus. The only question is whether the employer’s conduct has affected the terms and conditions of plaintiff’s employment. In contrast, the tangible employment action requirement in sexual harassment cases focuses on whether an agent of the employer has taken an official action against the plaintiff such that the court should impose strict vicarious liability.⁴⁶

As the Court recognized in the sexual harassment context, the challenged conduct must be sufficient to alter the terms and conditions of employment. However, the proper inquiry should be whether a reasonable person in the same situation would view the action as disadvantageous, regardless of whether it can be characterized as tangible, ultimate, or materially harmful.⁴⁷ Applying this analysis, courts should find that most transfers, negative evaluations, changes in work schedules, suspensions, and other similar actions constitute an alteration in the terms and conditions of employment. Further, other than harassment, these are official acts that can only be taken by agents of the employer, and not by fellow employees.⁴⁸ Thus, courts should hold

45. *Id.* at 64 (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

46. The *Ellerth/Faragher* Court adopted the tangible employment action requirement as a critical indicator that the harasser was misusing supervisory authority. *Faragher*, 524 U.S. at 804. Unlike coemployees, only supervisors are empowered to subject their victims to “tangible” employment decisions.

47. The law provides protection against frivolous suits by imposing an objective standard. See *Cullom v. Brown*, 209 F.3d 1035, 1041 (7th Cir. 2000) (finding that “[t]he adversity of an employment action is judged objectively”); *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (finding that employee must show objective harm rather than “[m]ere idiosyncracies of personal preference” to show adverse employment action). The Eleventh Circuit, in *Doe v. DeKalb County School District*, 145 F.3d 1441 (11th Cir. 1998), noted that it “found no case in this or any other circuit, in which a court explicitly relied on the subjective preferences of a plaintiff to hold that that plaintiff had suffered an adverse employment action.” *Id.* at 1448.

48. In *Faragher*, the U.S. Supreme Court, in discussing vicarious liability, referred to a “supervisor with immediate (or successively higher) authority over the employee.” *Faragher*, 524 U.S. at 807. In that case, one of the supervisors had authority to hire and fire while the other had authority to direct the day-to-day work activities of the plaintiff. Relying on *Faragher*, the EEOC adopted a policy guidance, which defines “supervisor” to include both an

employers liable, regardless of their negligence or knowledge of discrimination, and without the possibility of an affirmative defense.⁴⁹ A court should assess the extent to which a supervisor's misconduct causes economic loss or emotional harm only at the damages stage.

In addition to the statutory text and its 1991 amendment, further evidence shows that Congress did not intend to insulate employers who take discriminatory action against their employees simply because the injury falls short of an ultimate, materially adverse, or tangible employment act. An apt analogy can be drawn to the so-called "mixed-motive" cases, where a plaintiff presents evidence that illegal motive played a part in the employment decision, but there is also evidence that the employer had an independent,

individual with "authority to recommend tangible job decisions" and an individual "who is authorized to direct another employee's day-to-day work activities." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> [hereinafter EEOC, ENFORCEMENT GUIDANCE]; see also *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 411-12 (5th Cir. 2002) (finding that although harasser allegedly had low wage-earning capacity and could not directly hire or fire plaintiff, he had authority to direct plaintiff's daily activities, and in his deposition he described himself as a supervisor); *Gawley v. Ind. Univ.*, 276 F.3d 301, 310-11 (7th Cir. 2001) (holding that although harasser was not the female police officer's "immediate or successively higher supervisor," he had the ability to initiate disciplinary action against her, and, in general, "he was entrusted with powers that rendered [plaintiff] less likely to blow the whistle on him"); *Dees v. Johnson Controls World Serv., Inc.*, 168 F.3d 417, 421-22 (11th Cir. 1999) (stating that, after *Faragher*, an employer can be held vicariously liable if: "(1) the supervisor holds such a high position in the company that he could be considered the employer's 'alter-ego'; (2) the harassment violates a nondelegable duty of the employer; (3) the supervisor use[d] 'apparent authority' granted by the employer; or (4) the supervisor [was] aided in committing the harassment by the existence of [the] agency relationship") (citation omitted). But see *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) (stating that "the fact that an employer authorizes one employee to oversee aspects of another employee's job performance does not establish" supervisory liability unless that person "possesses the authority to directly affect the terms and conditions of [the] victim's employment," and "[a]bsent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer") (third alteration in original).

49. The concept of strict liability stems from Title VII's statutory language, which makes employers liable for the acts of their agents. The RESTATEMENT (SECOND) OF AGENCY § 219(1) (1994), as quoted in *Ellerth*, states that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755-56 (1998). Decisions regarding transfers, work schedules, evaluations, etc., fit within this principle. The Court in *Faragher* determined that supervisors who subject employees to a hostile work environment, but no tangible employment action, are presumptively aided by the agency relationship, but not necessarily so; thus the Court created the affirmative defense. *Faragher*, 524 U.S. at 789. However, hostile work environment harassment cases are the *only* exception to the rule of strict liability.

legitimate motive for its conduct. The Supreme Court, in *Price Waterhouse v. Hopkins*,⁵⁰ held that an employer may avoid liability entirely by proving, “by a preponderance of the evidence that it would have made the same decision in the absence of [the] impermissible motive.”⁵¹ Congress promptly responded with the Civil Rights Act of 1991, which overruled *Price Waterhouse*, specifically stating that once an employee proves that an illicit criterion “was a motivating factor for any employment practice, even though other factors also motivated the practice,” that employer is liable, whether or not the ultimate decision would have been the same absent the discrimination.⁵² The statute provides that where the employer demonstrates that she would have made the same decision, relief will be limited to declaratory and injunctive relief, and fees and costs “directly attributable only to the pursuit of the claim;” however, damages or an injunction requiring reinstatement, promotion, hiring, or back wages are not available.⁵³ In short, a showing of mixed-motive affects remedy, not liability. The balance Congress struck in the Civil Rights Act of 1991 seeks to acknowledge liability where an employer acts with discriminatory motive without unduly rewarding an employee who has not suffered significant harm from that discrimination. Courts should strike a similar balance in cases where impermissible discrimination was a motivating factor in the employment decision. Where the employer has engaged in statutory wrongdoing but contends that the harm is de minimis, liability should be imposed, leaving the injury question for the damages phase of the trial.

The U.S. Supreme Court engaged in a similar balance of the equities to resolve the question of how to treat “after-acquired” evidence of employee wrongdoing, which surfaces only after the adverse employment action is taken — for example, where, through discovery, the employer learns that an employee lied on her initial application or engaged in some posthiring misconduct that would have resulted in termination. Some lower courts had ruled that such evidence may serve as a complete defense to a Title VII claim on the theory that an employee who was not initially entitled to a job or who engaged in conduct that would have been grounds for termination has not been legally injured.⁵⁴ The Supreme Court has rejected this analysis, however. In

50. 490 U.S. 228 (1989).

51. *Id.* at 249-50.

52. 42 U.S.C. § 2000e-2(m) (2000).

53. *Id.* § 2000e-5(g)(2)(B).

54. In this case, for example, the Sixth Circuit affirmed summary judgment for the employer because the “employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct.” *McKennon v. Nashville Banner Publ’g Co.*, 9 F.3d 539, 542-43 (6th Cir. 1993), *rev’d*, 513 U.S. 352 (1995) (*McKennon I*).

McKennon v. Nashville Banner Publishing Co.,⁵⁵ the Court ruled, in the context of an age discrimination case, that an employee discharged because of her age is not totally barred from recovery even though she engaged in conduct that would have resulted in her termination.⁵⁶

The case arose under the Age Discrimination in Employment Act,⁵⁷ but the Supreme Court in *McKennon* relied heavily on the common purposes and goals of Title VII in reaching its conclusion.⁵⁸ The Court reasoned that after-acquired evidence cannot provide a post hoc justification for employer misconduct.⁵⁹ Although it would be inequitable to require reinstatement of someone the employer would have terminated or never would have hired, such evidence becomes critical only in assessing relief. Thus, for example, the Supreme Court reasoned that a trial court should normally calculate back pay “from the date of the unlawful discharge to the date the new information was discovered.”⁶⁰ Similarly, in the context of employer misconduct that falls short of a tangible or ultimate employment action, an employer should not be permitted to escape liability entirely, but rather, a court should consider the extent of the harm suffered by the employee in assessing damages.

Another principle derived from the sexual harassment cases is that courts should look cumulatively to all of the adverse actions that an employee has been subjected to, rather than assessing each act of discriminatory treatment in isolation. The Supreme Court, in *Harris v. Forklift Systems, Inc.*,⁶¹ stated that several factors should be considered in deciding whether an employee has been subjected to harassment in her work environment that has altered the terms and conditions of employment.⁶² The Court rejected the notion that a plaintiff had to prove severe psychological injury for the employer’s wrongdoing to be actionable; instead, the Court deemed it sufficient that the employee reasonably perceived the work environment as hostile or abusive.⁶³ The Court set forth the following factors to provide guidance to lower courts: “[1] the frequency of the discriminatory conduct; [2] its severity; [3] whether it is physically threatening or humiliating, or a mere offensive utterance; and [4] whether it unreasonably interferes with an employee’s work

55. 513 U.S. 352 (1995) (*McKennon II*).

56. *Id.* at 356-57.

57. 29 U.S.C. §§ 621-633 (2000).

58. *McKennon II*, 513 U.S. at 358.

59. *Id.* at 359-60.

60. *Id.* at 362.

61. 510 U.S. 17 (1993).

62. *Id.* at 23.

63. *Id.* at 22.

performance.”⁶⁴ The Court stated that this list is not exhaustive, and it recognized that the highly fact-sensitive nature of the inquiry defied the creation of “a mathematically precise test.”⁶⁵

As to the last factor, which is critical in assessing the harm question, Justice Ginsburg, in a separate concurring opinion, stated that a dominant inquiry is “whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance.”⁶⁶ An employer who denies an employee secretarial help, equipment, or access to information has engaged in discriminatory conduct that affects the employee’s ability to do her job, and yet many courts have rejected claims that an employer intentionally interfered with an employee’s job performance as “inactionable.”⁶⁷ Further, a court should find that an employer who frequently engages in less severe discriminatory acts, such as altering work hours, giving an undeserved low performance evaluation, or increasing an employee’s work load, has altered the terms and conditions of the employee’s job, even if, in isolation, this conclusion could not be drawn.⁶⁸

The Supreme Court’s sexual harassment cases also teach that, in determining whether transfers, less favorable work shifts, temporary demotions, and other negative employment acts constitute a change in terms and conditions of employment, a nuanced assessment of the facts in each particular case is necessary. The Court has rejected adoption of any fast

64. *Id.* at 23.

65. *Id.* at 22 (“This is not, and by its nature cannot be, a mathematically precise test.”).

66. *Id.* (Ginsburg, J., concurring).

67. *See, e.g., Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 691-92 (7th Cir. 2001) (finding allegations that employer “1) tried to force her to give up her custodial position, 2) told the male night custodians not to help female day custodians, 3) gave her additional responsibilities above what was expected of the male custodians, . . . and 4) intentionally interfered with the performance of her work duties” may have been harassing, but none of this conduct constituted a materially adverse change in working conditions sufficient to state a claim of disparate treatment); *see also supra* note 10 and accompanying text.

68. *See Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002) (finding that employer conduct falling short of an ultimate employment decision is still cognizable under Title VII, and although reassignment alone may not constitute adverse employment action, here the employee presented evidence that he was completely denied overtime and the denial was an alteration in his compensation, terms, conditions, or privileges of employment that “reach[ed] ‘some threshold level of substantiality’”; although individually the actions of which employee complained may not have risen to the level of an adverse employment action, they did when considered collectively) (quoting *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998)); *Wideman*, 141 F.3d at 1455-56 (looking cumulatively to alleged wrongdoing, which included improperly listing employee as a “no-show,” reprimanding and suspending employee for one day, manager threatening to shoot plaintiff if she went above his head, and one of employee’s supervisors delaying authorization for medical treatment; collectively, these acts constituted prohibited retaliation).

mechanical rules.⁶⁹ This demonstrates the inappropriateness of denying a jury trial in close cases. Just as in the case of sexual harassment, it can be argued that the analysis of workplace discrimination should be left to juries.⁷⁰ The Supreme Court in *Harris* explained that the relevant questions are: (1) whether the “victim . . . subjectively perceive[s] the environment to be abusive;” and (2) whether, objectively, a reasonable employee could conclude that she is being subjected to a discriminatory alteration of the terms and conditions of her employment.⁷¹ Many lower courts addressing claims of sexual harassment have cautioned that granting summary judgment is appropriate only if it can be concluded as a matter of law that no rational juror could view the defendant’s conduct as an impermissible alteration of the plaintiff’s working conditions.⁷² Furthermore, recent Supreme Court decisions express concern that lower court judges are impermissibly denying plaintiffs the right to a jury trial, particularly in the context of employment discrimination claims.⁷³

69. *Harris*, 510 U.S. at 22.

70. In *Gallagher v. Delaney*, 139 F.3d 338 (2d Cir. 1998), the court reasoned that because federal judges usually live “in a narrow segment of the enormously broad American socio-economic spectrum,” they generally lack “the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.” *Id.* at 342. The court reasoned, therefore, that juries, not judges, should decide what is and is not proper in the workplace. *Id.* at 342-43.

71. *Harris*, 510 U.S. at 21-22.

72. See, e.g., *Haugerud*, 259 F.3d at 693-96 (holding that the district court erred in granting summary judgment where “a reasonable fact finder could [have found] that plaintiff was treated differently than her male colleagues because of her sex, in a manner that was both subjectively and objectively harassing;” although none of the incidents were severe, they were “at a sufficient level of pervasiveness to trigger liability,” such as employer “plotting to give her job to a male custodian, increasing her duties in an attempt to make her quit, withholding necessary assistance, [and] hiding the tools necessary to do her job”); *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 75-76 (2d Cir. 2001) (finding genuine issues of fact as to whether the supervisor’s alleged “conduct crossed the line between ‘boorish and inappropriate’ behavior and actionable sexual harassment” and whether such “conduct ‘unreasonably interfere[d] with [employee’s] work performance,’” precluding summary judgment) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998)) (first alteration in original).

73. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the U.S. Supreme Court admonished the Fifth Circuit for disregarding evidence that supported an ADEA plaintiff’s prima facie case — the court “impermissibly substituted its judgment concerning the weight of the evidence for the jury’s.” *Id.* at 153. Although the case arose in the context of a court granting judgment as a matter of law, the Court explained that the same need to “draw all reasonable inferences in favor of the nonmoving party” applies in the context of summary judgment. *Id.* at 150. Further, the Supreme Court has recently cautioned against imposing any heightened pleading standard with regard to employment discrimination complaints. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court ruled that a district court erred in requiring the “plaintiff to plead [specific] facts establishing a prima facie case” under the

III. Retaliation Claims

The requirement that an employee point to an alteration in the terms and conditions of employment to prove an unlawful employment practice does not appear in Title VII's prohibition of retaliation. Rather, section 704(a)(1) of the Act simply states that it is "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation, proceeding, or hearing under this subchapter."⁷⁴ Nonetheless, many courts have superimposed a requirement that the retaliatory conduct tangibly affect terms and conditions of employment in order to be actionable.⁷⁵ The Fifth and Eighth Circuits have

McDonnell-Douglas standard in order to avoid dismissal. *Id.* at 511. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court held that, to establish a prima facie case, plaintiff must plead she is a member of a minority group, she applied for the job, she met the job qualifications, that she was rejected, and that "the position remained open and the employer continued to seek applicants" with the plaintiff's qualifications. *Id.* at 802.

74. 42 U.S.C. § 2000e-3(a) (2000).

75. See *supra* note 27 and accompanying text; see also *Longstreet v. Ill. Dep't of Corr.*, 276 F.3d 379, 383-84 (7th Cir. 2002) (finding that an employee's transfer to an allegedly more difficult position and negative performance evaluations were not tangible job consequences and thus could not qualify as adverse retaliatory action under Title VII); *Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 87 (2d Cir. 2001) (holding that an employee who was transferred from one office to another and who was physically removed from her first office failed to state a claim for retaliation because the employee failed to "allege what tangible adverse effect this incident had on the terms and conditions of her employment"), *abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Sweeney v. West*, 149 F.3d 550, 556-57 (7th Cir. 1998) (stating that, although "[a] dirty look or the silent treatment might be as effective at discouraging complaints as demoting an employee," the examples used in the statute's principle section, namely section 703(a), "exclude instances of different treatment" that do not result in some tangible job consequence); *Munday v. Waste Mgmt. of N. Am.*, 126 F.3d 239, 243 (4th Cir. 1997) (finding that, for retaliation claims, the adverse action must affect "terms, conditions, or benefits of employment," and "instruct[ing] employees to ignore and spy on" plaintiff was not an adverse employment action); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300-01 (3d Cir. 1997) (finding that the adverse employment action required for a prima facie case of retaliation "incorporates the same requirement that . . . conduct rise to the level of a violation of 42 U.S.C. § 2000e-2(a)(1) or (2)" and oral reprimands and derogatory remarks "do not rise to the level of [an] adverse employment action"); *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997) (stating that even though the retaliation provision is not limited to "terms, conditions, or privileges of employment," the court would incorporate this reference as a qualifier of retaliation claims because a broad interpretation would encourage employees who were "aggrieved by slights," to file "whimsical claims"); *Yerdon v. Henry*, 91 F.3d 370, 378 (2d Cir. 1996) (requiring that, for retaliation claims, adverse employment action must, as in the case of disparate treatment claims, affect "terms, privileges, duration, or conditions of

required that an employee show that she has been subjected to an ultimate employment decision.⁷⁶ Other courts have mandated that the employee demonstrate a “materially adverse” or a “tangible” employment action to survive dismissal.⁷⁷

employment’”) (quoting *Johnson v. Frank*, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993)).

76. See *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 531-32 (5th Cir. 2003) (holding that *Mattern*’s strict ultimate employment decision test mandates a finding that the employer’s filing of a counterclaim against an employee cannot support a retaliation suit under Title VII); *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1060 n.10 (5th Cir. 1998) (finding that allegations that an employer “requir[ed] [employee] . . . to perform manual tasks, plac[ed] him in a smaller office, and reduc[ed] the number of employees he supervised” is not actionable because such conduct does not constitute an ultimate employment decision); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (requiring that retaliatory action be an ultimate employment decision to be actionable under Title VII); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997) (holding that “verbal threat of being fired,” reprimands, and “being placed on ‘final warning’” were not ultimate employment decisions actionable as retaliation). But see *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (8th Cir. 1997) (finding that employee’s transfer to a different, but higher salaried position was actionable where employee complained that the new position had “fewer opportunities for salary increases” and advancement and was not supervisory); see also *Hernandez*, 321 F.3d at 533 (Dennis, J., concurring) (urging the en banc panel to revisit *Mattern*, stating that “this rule is inimical to both the text and the purpose of the anti-retaliation provision of Title VII”); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (holding that, based upon the language of Title VII, “the term ‘discriminate’ is not limited to ‘ultimate employment decisions,’” and unwarranted written reprimands, supervisor solicitation of negative statements from other employees, threats and needless delay in authorizing medical treatment constitute adverse employment actions); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (noting that “demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees” are actionable under Title VII); *Yartsoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (holding that nonultimate employment decisions such as “transfers of job duties and undeserved performance ratings, if proven, would constitute ‘adverse employment decisions’” under the antiretaliation provision); Eric M.D. Zion, Note, *Overcoming Adversity: Distinguishing Retaliation from General Prohibitions Under Federal Employment Discrimination Law*, 76 IND. L.J. 191, 194 (2001) (“[T]he majority of circuits do not restrict section 704(a)’s language to such a reading but instead include lesser adverse actions with some minimum level of substantiality.”). This Article contends, however, that any substantiality test requiring more than proof of a “chilling effect” is unwarranted by the statutory language. See *infra* note 100 and accompanying text.

77. See *Petersen v. Utah Dep’t of Corr.*, 301 F.3d 1182, 1189 (10th Cir. 2002) (requiring that retaliation be a “materially adverse” employment action, and neither allegations of taking employee “out of the information loop” or unsuccessful attempt to transfer employee meet this standard); *Moisant v. Air Midwest, Inc.*, 291 F.3d 1028, 1031 (8th Cir. 2002) (finding that, “to establish an adverse employment action [in a retaliation case,] an employee must show a ‘tangible change in duties or working conditions that constitute[] a material employment disadvantage’”) (quoting *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997)); *Gawley v. Ind. Univ.*, 276 F.3d 301, 314-15 (7th Cir. 2001) (holding that plaintiff’s claim that her supervisor criticized her sexual harassment report and distributed it to unauthorized

The U.S. Equal Employment Opportunity Commission (EEOC), in its Compliance Manual, has correctly interpreted the retaliation provision of Title VII to focus on whether the employer's conduct, even if it falls short of a termination or tangible act, would deter the reasonable person from engaging in protected activity.⁷⁸ The manual states, "Although trivial annoyances are

personnel was not a materially adverse employment action and thus could not support a Title VII retaliation claim; further, stating that this action falls into "the same class . . . as an unfavorable letter [put] in [an] employee's file," which may not result in any material change in terms and conditions of employment); *Stutler v. Ill. Dep't of Corr.*, 263 F.3d 698, 702-04 (7th Cir. 2001) (finding that an employee subjected to an undesired transfer, change in job title, negative performance reviews, threats of termination, and other harassing conduct failed to show material harm; to be actionable, adverse employment action "must be a 'significant change in employment status . . . or a decision causing a significant change in benefits'" (quoting *Bell v. EPA*, 232 F.3d 546, 555 (7th Cir. 2000))); *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (requiring the "plaintiff [to] identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII"); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (holding that the transfer of an employee to a more stressful job is not an adverse employment action because employee failed to show it had a "significant detrimental effect on her"); *Robinson*, 120 F.3d at 1300 (finding that retaliation must be "tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment"); *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997) (requiring that plaintiff show "a materially adverse change in the terms and conditions of employment" for an actionable retaliation claim) (quoting *McKenney v. New York City Off-Track Betting Corp.*, 903 F. Supp. 619, 623 (S.D.N.Y. 1995)).

78. See COMPLIANCE MANUAL, *supra* note 6, § 8-II(D)(3), at 8-14. The manual explains: The anti-retaliation provisions are exceptionally broad. They make it unlawful "to discriminate" against an individual because of his or her protected activity. This is in contrast to the general anti-discrimination provisions which make it unlawful to discriminate with respect to an individual's "terms, conditions, or privileges of employment." The retaliation provisions set no qualifiers on the term "to discriminate," and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment.

Id. The manual also addresses retaliation claims brought under the ADEA, the EPA, and the ADA. *Id.* § 8.

The Ninth Circuit, in *Ray v. Henderson*, adopted the EEOC position, reasoning that "[a]lthough EEOC Guidelines are not binding on the courts, they 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" 217 F.3d 1234, 1243 (9th Cir. 2000) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)); see also *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000) ("Title VII allows employees to freely report actions that they reasonably believe are discriminatory, even if those actions are in fact lawful. Absent a judicial remedy, the type of actions [that the plaintiff] asserts her employer engaged in could discourage other employees from speaking freely about discrimination.") (citation omitted); *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997) (finding that "the retaliatory dissemination of a negative employment reference violates Title VII, even if the negative reference does not affect the prospective employer's decision not to hire" plaintiff because such retaliatory conduct might

not actionable, more significant retaliatory treatment that is reasonably likely to deter protected activity is unlawful. There is no requirement that the adverse action materially affect the terms, conditions, or privileges of employment.”⁷⁹ Contrary to the approach in many circuits, the manual stipulates that actionable retaliation occurs where an employee is reprimanded or threatened, where she receives a negative evaluation, or is harassed or otherwise adversely treated as the result of her participation in a claim against an employer.⁸⁰ The manual states as obvious examples of adverse action “denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge.”⁸¹ The guidelines also recognize “threats, reprimands, negative evaluations, harassment or other adverse treatment” as behavior falling within the scope of actionable adverse employment conduct.⁸² The Commission has specifically rejected those decisions that have adopted an unduly restrictive construction of the retaliation clause, arguing instead that the Act prohibits “any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.”⁸³

As some courts have acknowledged, the retaliation provision is broader on its face than the general discrimination provision because it reaches all retaliatory discrimination.⁸⁴ On one level, it may seem incongruous that Congress could have intended to prohibit actions under the retaliation clause that would be allowed under the discrimination section of the statute. However, Congress intentionally refused to adopt a more restrictive retaliation

have a chilling effect on the remaining employees).

79. COMPLIANCE MANUAL, *supra* note 6, § 8, at iv.

80. *Id.* § 8-II(D)(1), at 8-11.

81. *Id.*

82. *Id.*

83. *Id.* § 8-II(D)(3), at 8-13. The Commission acknowledges that “petty slights and trivial annoyances” would not likely deter protected activity but that more significant retaliatory treatment can be challenged regardless of the level of harm. *Id.* It has been argued that the “reasonably likely to deter” language is vague; however, courts have had experience for years dealing with this standard in the context of First Amendment retaliation claims. See *infra* notes 91-95 and accompanying text.

84. See *McDonnell v. Cisneros*, 84 F.3d 256, 258 (7th Cir. 1996) (“[P]rovision regarding retaliation may intentionally be broader, since it is obvious that effective retaliation against employment discrimination need not take the form of a job action”); see also *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (adopting EEOC standard that “an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity”). Older decisions reflect this broader interpretation. See *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994), which lists as adverse retaliatory action “demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.” *Id.* at 15-16.

provision,⁸⁵ recognizing that employees are unlikely to come forward to complain of discrimination against them or another employee if they believe such action will be met with retaliation in any form.⁸⁶ The goals of this provision require an assurance that employees who exercise their statutory rights or who assist others in doing so will not be subject to adverse action. The Supreme Court, in *Robinson v. Shell Oil Co.*,⁸⁷ acknowledged the need for a broad interpretation of Title VII's retaliation provision because those who engage in EEOC activity must be confident that the Act will protect them.⁸⁸ The *Robinson* Court unanimously held that Title VII protects those who are subject to retaliation even after their employment has ended, such as where a former employer provides a negative reference to a prospective employer.⁸⁹ The Court reasoned that this interpretation of the term "employee" was more consistent with the statute and its aims.⁹⁰

85. Representative Albert Watson (R.-S.C.) proposed to amend the statute to allow employers to retaliate against employees who file charges that are not verified by the EEOC or a federal court. 110 CONG. REC. 2729 (1964). The amendment was quickly rejected. *Id.* at 2730. In addition, Congress intentionally chose to use the term "discriminate" and the relevant legislative history defines this as follows: "to discriminate is to make a distinction, to make a difference in treatment or favor." 110 CONG. REC. 7213 (1964), reprinted in U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLE VII AND IX OF CIVIL RIGHTS ACT OF 1964, at 3040 (1968). The EEOC argues that if Congress wanted the qualifier contained in section 703(a) it would have inserted it. See COMPLIANCE MANUAL, *supra* note 6, § 8-II(D), at 3.

86. *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 746 (7th Cir. 2002) (noting in dictum that retaliation claims need not involve a materially adverse employment action because "it presumably takes rather little to deter . . . altruistic action" by employees who are making or assisting a complaint on behalf of a coworker); *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) ("Section 704(a)'s protections ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses."); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) ("Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination.").

87. 519 U.S. 337 (1997).

88. *Id.* at 346.

89. *Id.*

90. *Id.* Justice Thomas stated that proper statutory analysis requires an examination of the actual language, the context in which the language is used, and finally a construction of the language within the broader context of the statute. *Id.* at 341. The term "to discriminate" in section 704(a) is different from the text in section 703 that requires the discrimination affect the terms and conditions of employment. Compare Civil Rights Act of 1964, Pub. L. No. 88-352, § 704(a), 78 Stat. 241, 257, with § 703(a), 78 Stat. at 255. Further, Justice Thomas notes that a narrow reading of this provision would "undermine the effectiveness of Title VII." *Robinson*, 519 U.S. at 346.

An appropriate analogy is to First Amendment retaliation cases where the Supreme Court has suggested that even fairly minor retaliatory harassment may be actionable. In *Rutan v. Republican Party*,⁹¹ the Court explained: “[T]he First Amendment . . . already protects state employees not only from patronage dismissals but also from ‘even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.’”⁹² The Seventh Circuit had proposed that only politically based employment decisions that are “the substantial equivalent of a dismissal” violate the First Amendment.⁹³ The Supreme Court found this standard unduly restrictive, because it failed to recognize that less harsh deprivations can also chill speech.⁹⁴

Following *Rutan*, many courts have recognized that employees alleging free speech violations need not show that they were subjected to “materially adverse” or “ultimate employment actions,” provided the injury “would chill a person of ordinary firmness” from engaging in protected activity.⁹⁵ Employees who suffer changes in job responsibilities, reprimands, transfers, or threats of discharge in retaliation for engaging in expressive activity have

91. 497 U.S. 62 (1990) (*Rutan II*).

92. *Id.* at 76 n.8 (quoting *Rutan v. Republican Party*, 868 F.2d 943, 954 n.4 (7th Cir. 1989) (*Rutan I*)) (second alteration in original). Although being denied a birthday party should not deter a reasonable employee from going forward with a charge of discrimination, and thus is probably not actionable under Title VII, the importance of the Supreme Court’s decision is its recognition that action short of ultimate, or materially adverse, employment decisions may chill speech and thus be actionable.

93. *Rutan I*, 868 F.2d at 955-56.

94. *Rutan II*, 497 U.S. at 75.

95. *Farmer v. Cleveland Pub. Power*, 295 F.3d 593, 602 (6th Cir. 2002) (requiring only that the plaintiff “suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that [constitutionally protected] activity” to find adverse employment action) (quoting *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998)) (alteration in original); see also *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002) (stating that denial of even a trivial benefit may form the basis for a First Amendment claim where the aim is to punish speech); *Bell v. Johnson*, 308 F.3d 594, 603-05 (6th Cir. 2002) (holding that “unless the claimed retaliatory action is truly ‘inconsequential,’ the plaintiff’s [First Amendment] claim should go to the jury” and that the district court erred in ruling that the plaintiff had presented insufficient evidence that official’s conduct, which consisted of twice leaving plaintiff’s prison cell in disarray and confiscating legal papers and medical diet snacks, had an intimidating effect on him); *Smith v. Fruin*, 28 F.3d 646, 649 n.3 (7th Cir. 1994) (“[E]ven minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures.”); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (“The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable.”). In *Bart*, however, the Court held that trivial actions would be actionable only if they formed part of a “campaign of [retaliatory] harassment.” *Id.*

been permitted to litigate their claims.⁹⁶ Indeed, the Seventh and Ninth Circuits have refused to apply the restrictive “adverse employment action” cases developed under the federal employment discrimination statutes to First Amendment claims.⁹⁷ Further, courts have recognized that “a combination of

96. See *Farmer*, 295 F.3d at 602 (finding that a reduction in plaintiff’s job responsibilities, which plaintiff claimed changed her status from that of a policymaking, supervisor-level employee to someone engaged in merely performing in clerical and training tasks, qualifies); *Thomsen v. Romeis*, 198 F.3d 1022, 1027 (7th Cir. 2000) (noting that three reprimands may be actionable if they create the potential for chilling employees’ speech on matters of public concern, even where the consequences appear somewhat speculative); *Edwards v. Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999) (holding that the First Amendment prohibits an employer from threatening to discharge an employee in an effort to chill the exercise of the employee’s First Amendment rights).

97. See *Coszalter v. City of Salem*, 320 F.3d 968, 975-76 (9th Cir. 2003) (finding that, for First Amendment claims, the adverse employment action “need not be severe and it need not be of a certain kind”; although recognizing that the retaliatory action may be so insignificant so as not to deter the exercise of First Amendment rights, the court rejected the use of any “exclusive, category-based limitation on the kind of retaliatory action that is actionable under the First Amendment”; instead, the court held that it suffices that defendants’ action was “reasonably likely to deter” employees from engaging in protected activity); *Power v. Summers*, 226 F.3d 815, 820-21 (7th Cir. 2000) (holding that, in contrast to federal employment discrimination statutes that limit protection to victims of adverse employment action, any deprivation that is likely to deter the exercise of free speech is actionable in First Amendment cases).

Contrary to *Power*, some courts, in particular those in the Fifth and Eighth Circuits, have erroneously required a greater showing of injury even in First Amendment retaliation cases. See *Serna v. City of San Antonio*, 244 F.3d 479, 483-85 (5th Cir. 2001) (finding that adverse employment action may occur when employee is transferred, even without accompanying loss of tangible job benefits, but “plaintiff must produce enough evidence to allow a reasonable trier of fact to conclude that . . . the transfer caused harm to the plaintiff, ‘sufficiently serious to constitute a constitutional injury’”) (quoting *Breaux v. City of Garland*, 205 F.3d 150, 152 (5th Cir. 2000)); *Breaux*, 205 F.3d at 156-61 (holding that retaliation consisting of “investigations, criticisms, public . . . reprimands, psychological and polygraph testing, suspension with pay, [and a] . . . transfer — do not, either individually or collectively, constitute adverse employment actions”). But see *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 580 (5th Cir. 2003) (recognizing that § 1983’s definition of adverse employment action is more expansive than the ultimate decision test used under Title VII and that a retaliatory act may consist of reprimands, disciplinary filings, or a transfer tantamount to a demotion, which would *not* qualify as an ultimate employment decision under Title VII; concluding, however, that failure to promote and pay plaintiff at the appropriate salary would not meet even § 1983’s broadened definition of adverse employment action).

The Eighth Circuit has also improperly cited Title VII decisions in determining that retaliatory conduct is not actionable under the First Amendment. See *Jones v. Fitzgerald*, 285 F.3d 705, 712-15 (8th Cir. 2002) (finding that neither an involuntary transfer, which resulted in “no diminution in title, position, salary, job responsibilities, benefits, hours, or other material terms or conditions,” the presence of “negative memoranda in her personnel file,” nor an internal investigation that resulted in “no material disadvantage in a term or condition of

seemingly minor incidents [may] form the basis of a constitutional retaliation claim.”⁹⁸ Because Congress, in enacting Title VII’s retaliation provision, was similarly concerned with protecting those who seek to disclose employer wrongdoing,⁹⁹ the focus in these cases should be on whether the retaliatory treatment would keep a person of ordinary firmness from reporting discrimination or assisting another in filing a charge. The retaliation provision lacks any reference to “terms and conditions of employment,” and thus courts should not superimpose the disparate treatment adverse employment action requirement onto retaliation cases. This also means that retaliation need not take the form of a job action, but rather, can be separate from the employment relationship.¹⁰⁰ Provided it meets the threshold “chilling” or deterrence level, a court should address the magnitude of the retaliatory conduct only at the damages phase.¹⁰¹ Those circuits that have rejected such claims have ignored the clear language of the statute and its intended purpose.

IV. Proposed Analysis for Employer Wrongdoing

As suggested in Parts II and III, the question of whether an employee has suffered sufficient harm to have an actionable claim under Title VII should

employment” constitutes an adverse employment action; to prove a constitutional injury, the employee must prove “‘a tangible change in duties or working conditions that constitute a material disadvantage’” (quoting *Phillips v. Collings*, 256 F.3d 843, 848 (8th Cir. 2001)); *Duffy v. McPhillips*, 276 F.3d 988, 992 (8th Cir. 2002) (finding that “minor shifts in employment responsibility did not significantly alter the conditions of [the plaintiff’s] employment” and, therefore, did not constitute an adverse employment action); *Bechtel v. City of Belton*, 250 F.3d 1157, 1162 (8th Cir. 2001) (holding that “adverse employment action must effectuate ‘a material change in the terms or conditions of . . . employment’” in order to establish a First Amendment violation) (quoting *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)) (alteration in original). *But see* *Meyers v. Neb. Health & Human Servs.*, 324 F.3d 655, 659-60 (8th Cir. 2003) (finding that although “[l]oss of status and prestige alone” will not constitute an adverse employment action in a First Amendment retaliation case, district court erred in holding that plaintiff’s reassignment was not actionable simply because the pay, benefits, and job title did not change; where there is evidence that the new position requires fewer skills and less responsibility, a jury might find that transfer to a menial position is actionable).

98. *Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002) (“[T]o prove a claim of First Amendment retaliation in a situation other than the classic examples of discharge, refusal to hire [or] promote, demotion, reduction in pay, and reprimand, plaintiff must show, (1) using an objective standard; (2) the total circumstances of her working environment changed to become unreasonably inferior and adverse when compared to a typical workplace.”).

99. *See supra* notes 84-85 and accompanying text.

100. *See infra* Part IV.F.

101. *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (holding that the severity of the retaliatory conduct is relevant to damages, but not liability).

depend in part on whether an employee alleges discrimination or retaliation.¹⁰² Further, the harm inquiry should take into account the totality of the circumstances and the cumulative effect of various types of discriminatory conduct.¹⁰³ In many fact scenarios, an employee is subjected to various types of wrongdoing, including negative evaluations, transfers to a less desirable location, and changes in working conditions.¹⁰⁴ With this in mind, the following sections will break down each type of employer wrongdoing and suggest how courts should analyze an injury in light of the principles discussed in Parts II and III.

A. Transfers, Demotions, and Changes in Title

Many courts have ruled that transfers, demotions, and changes in title that are not accompanied by an actual loss of salary or other tangible job benefits are not actionable.¹⁰⁵ For example, in *Weeks v. New York State (Division of Parole)*,¹⁰⁶ the Second Circuit concluded that an employee who was transferred from one office to another and was “physically removed” from the first office could not show an adverse employment action for purposes of her retaliation claim because she did not specify what tangible adverse effect this transfer had on the terms and conditions of her employment.¹⁰⁷ Similarly, in *Stutler v. Illinois Department of Corrections*,¹⁰⁸ the court held that an alleged retaliatory lateral transfer was not an adverse employment action even if the employee did not like his new job because there was no evidence that the transfer decreased his benefits or responsibilities.¹⁰⁹ The Fourth Circuit, in *Boone v. Goldin*,¹¹⁰ determined that the transfer of an employee to a more stressful job after settling an administrative complaint could not be an adverse employment action where the employee failed to show it had a “significant detrimental effect” on her.¹¹¹ Finally, in *Policastro v. Northwest Airlines*,

102. See *supra* Part II (discussing discrimination) and Part III (discussing retaliation).

103. See notes 41 and 61-65 and accompanying text.

104. See *supra* note 13.

105. See cases cited *supra* note 7.

106. 273 F.3d 76 (2d Cir. 2001), *abrogated on other grounds by* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

107. *Id.* at 86-87.

108. 263 F.3d 698 (7th Cir. 2001).

109. *Id.* at 702-04.

110. 178 F.3d 253 (4th Cir. 1999).

111. *Id.* at 256; see also *White v. Burlington N. & Santa Fe Ry.*, 310 F.3d 443, 451 (6th Cir. 2002) (finding that the transfer of a female worker to a job “involv[ing] heavy lifting and more physically demanding tasks” after she complained of sexual harassment does not establish a *prima facie* case of retaliation), *vacated pending reh'g en banc*, 321 F.3d 1203 (6th Cir. 2003); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (finding that the

Inc.,¹¹² the Sixth Circuit reasoned that a transfer, which required the employee to travel more often, was not a “materially adverse” change in the terms or conditions of employment.¹¹³ The court noted that general reassignments that are not accompanied by a change “in salary, benefits, title, or work hours usually do not constitute adverse employment actions.”¹¹⁴ While the latter two cases involved claims of disparate treatment, the first two alleged retaliatory motivation.

As suggested in Part II of this Article, where discrimination takes the form of unwanted transfers or demotions, even though no tangible job benefits are lost, an employee should be permitted to proceed with her disparate treatment case without demonstrating a “significant detrimental effect.” Although employers are obviously permitted to assign employees to positions that are more stressful or more physically demanding, where an employee is selected for illegitimate discriminatory or retaliatory reasons, a Title VII violation has occurred. Unlike sexual harassment, all transfers and demotions are official acts of the employer, which trigger the rule of absolute liability.¹¹⁵ Further, such acts must be viewed as explicit, rather than constructive, alterations of the terms or conditions of employment.¹¹⁶ Provided a reasonable person would view the transfer as disadvantageous, the claim should be actionable.¹¹⁷ A 1999 EEOC Guidance defines tangible employment action to include any “undesirable reassignment.”¹¹⁸ Where a supervisor bases a disadvantageous

reassignment of an employee to more stressful job was not adverse employment action).

112. 297 F.3d 535 (6th Cir. 2002).

113. *Id.* at 539-40.

114. *Id.* at 539.

115. See *supra* notes 47-48 and accompanying text. See also the Court’s explanation in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998):

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . A co-worker can break a co-worker’s arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another’s pay, nor can one co-worker demote another.

Id. at 761-62 (citations omitted).

116. In *Ellerth*, the Court distinguished explicit discriminatory changes to the terms or conditions of employment from constructive alterations, where the conduct must be severe or pervasive in order to be actionable. *Ellerth*, 524 U.S. at 752.

117. All the circuits that have addressed this issue have agreed that an adverse employment action must be viewed objectively: “If a transfer is truly lateral and involves no significant changes in an employee’s conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer adverse employment action.” *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 n.6 (10th Cir. 1998). See also cases cited *supra* note 47.

118. EEOC, ENFORCEMENT GUIDANCE, *supra* note 48, § IV(B).

employment decision on an illicit criterion, courts should impose absolute vicarious liability on the employer.¹¹⁹

The Supreme Court in its sexual harassment cases has ratcheted up the standard for absolute vicarious liability, requiring "reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."¹²⁰ However, an employee's failure to meet the higher standard does not alter the vicarious liability rule. It simply means that an employer would be permitted to assert, as an affirmative defense, that it took reasonable steps to prevent and correct a supervisor's harassing conduct, *and* that the employee unreasonably failed to avail herself of the employer's grievance mechanism.¹²¹ The U.S. Supreme Court's goal was to encourage employers to adopt and enforce effective sexual harassment policies in the workplace, and perhaps to provide some leeway to employers in this still evolving area of the law.¹²²

In the typical disparate treatment case challenging a transfer or demotion, this should not be a concern. Since 1964, employers have been well aware that race- or gender-based transfers or demotions violate Title VII. Further, even if an affirmative defense is available, these are cases where employees act "reasonably" in coming forward to challenge discriminatory practices.¹²³ Thus, traditional agency principles, which impose liability on the employer for

119. See *supra* note 34 and accompanying text.

120. *Ellerth*, 524 U.S. at 761; see also *supra* note 35 and accompanying text.

121. *Ellerth*, 524 U.S. at 742; see also *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1279-80 (11th Cir. 2002) (finding that the employer has no affirmative defense where, despite having a policy, "no member of the management hierarchy was familiar with it, [and] it was not posted in the workplace"; further, an antiharassment policy will be "found ineffective when company practice indicates a tolerance towards harassment or discrimination"); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 699 (7th Cir. 2001) (finding that, although the school district had a sexual harassment policy with a complaint procedure, it failed to exercise reasonable care in preventing harassing conduct where, following a female custodian's complaint, the school district did not pursue an internal investigation or take any effective remedial action); *Nichols v. Rest. Enters., Inc.*, 256 F.3d 864, 877 (9th Cir. 2001) (finding that, although an employer satisfied the first prong of the affirmative defense by requiring mandatory sexual harassment training for all of its employees and adopting a written antiharassment policy clearly setting forth reporting procedures, it failed to exercise reasonable care to promptly correct sexually harassing behavior where human resources director conducted only a handful of spot checks but made no effort to investigate complaint or to discuss allegations with perpetrators); *Greene v. Dalton*, 164 F.3d 671, 674-75 (D.C. Cir. 1999) (holding that, in order to meet its affirmative defense, an employer must establish not only that the victim of harassment inexcusably delayed reporting the harassment, but also that a reasonable person would have come forward early enough to prevent the harassment from becoming severe or pervasive).

122. *Ellerth*, 524 U.S. at 764.

123. See *infra* notes 147-49 and accompanying text.

its agent's misconduct, should govern.¹²⁴ Where race, gender, religion, or national origin is a motivating factor behind a disfavored change in an employee's job, a court should find liability. The extent of the harm caused by the transfer or demotion should be assessed only at the damages phase.

In the context of a retaliation claim, which does not even require a change in the terms and conditions of employment, the only inquiry is whether the retaliatory action would have deterred a reasonable employee from exercising her statutory right to bring a claim or to assist another in bringing a claim.¹²⁵ Most workers would probably be unwilling to subject themselves to transfers that add mileage onto their trips or that create the stress of new job responsibilities, or to demotions, which can clearly cause emotional distress and embarrassment even when not accompanied by a "tangible" job loss.¹²⁶

The courts' failure to recognize the emotional injury caused by discriminatory or retaliatory transfers, demotions, or changes in job title is directly contrary to the Civil Rights Act of 1991, which has the very purpose to ensure that emotional harms imposed as a result of impermissible bias would be appropriately recognized and rectified by an award of damages.¹²⁷ Arguably, if a transfer is more or at least equally desirable, an employee will have difficulty establishing chilling effect or impermissible intent, and thus employers should not fear frivolous litigation.¹²⁸ On the other hand, courts are ignoring the fact that "where a person lives and works often is more important

124. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986) (finding that Congress intended courts "to look to agency principles for guidance" when determining employer liability under Title VII).

125. See *supra* Part III (discussing retaliation).

126. See, for example, *Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania*, 162 F.3d 235 (3d Cir. 1998), which held that the district court erred in granting summary judgment where an employee alleged that she was transferred to a job that her employer knew she could not perform. *Id.* at 236. The court also stated that "[i]t is important to take a plaintiff's job-related attributes into account when determining whether a lateral transfer was an adverse employment action." *Id.* The point is that only a careful sifting of the facts will determine whether a transfer is "adverse," even where economic factors and title remain the same.

127. See *supra* note 17 and accompanying text.

128. *Contra* Cude & Steger, *supra* note 18, at 398 ("[A] liberal interpretation . . . opens the door to a myriad of claims for trivial acts, and gives the courts free reign to second-guess an employer's business decisions."). The authors also express their concern that courts will become "bogged down in trivial disputes within the workplace." *Id.* But see Zion, *supra* note 76, at 215 (arguing that the trend towards narrow definition of section 704(a) has not led to less litigation; rather, the empirical data demonstrates an increase in retaliation claims filed with the EEOC). Further, a plaintiff must still demonstrate that the action is sufficiently harsh to deter the reasonable employee, that there is a causal connection between the adverse action and the protected activity, and that any purported legitimate, nondiscriminatory reason is a pretext for retaliation. See, e.g., *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997).

than the salary or benefits he/she receives,"¹²⁹ and thus an employee should be given the opportunity to prove that a transfer decision is objectively, as well as subjectively, adverse.

B. Negative Evaluations, Reprimands, and Threats of Termination or Demotion

Many courts have dismissed employee claims where the employer's wrongdoing consists of alleged unmerited negative evaluations, reprimands, or threats of termination or demotion. The rationale given is that until the negative evaluations or threats culminate in the loss of tangible job benefits, an employee has no recourse under Title VII.¹³⁰ Thus, in *Ribano v. United Airlines, Inc.*,¹³¹ the court noted that unfavorable letters placed in an employee's file are not actionable retaliation because they may not result in a material change in the terms and conditions of employment.¹³² In *Smart v. Ball State University*,¹³³ the court stated that the question was "not whether [the plaintiff's] performance evaluations were undeservedly negative, but whether even undeserved poor evaluations can alone constitute" an adverse employment action sufficient to state a prima facie case.¹³⁴ The court rejected the plaintiff's claim, asserting that "not everything that makes an employee unhappy is an actionable adverse action."¹³⁵ In *Weston v. Pennsylvania*,¹³⁶ the court similarly ruled that two written reprimands placed in an officer's personnel file after he complained about sexual harassment could not constitute an adverse employment action where the officer "was not demoted in title, did not have his work schedule changed, was not reassigned to a different position or location in the prison . . . and that he was not denied any pay raise or promotion as a result of these reprimands."¹³⁷

129. *Lepique v. Hove*, 217 F.3d 1012, 1014 (8th Cir. 2000) (Heaney, J., concurring). Note that the judge concurred in the decision that a transfer is not actionable if it does not result in a change in the employee's pay, benefits, or working conditions because he felt bound by the circuit's precedent. *Id.* (Heaney, J., concurring).

130. See cases cited *supra* note 8.

131. 200 F.3d 507 (7th Cir. 1999).

132. *Id.* at 511.

133. 89 F.3d 437 (7th Cir. 1996).

134. *Id.* at 442.

135. *Id.* at 441.

136. 251 F.3d 420 (3d Cir. 2001).

137. *Id.* at 431; see also *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1301 (3d Cir. 1997) (finding that "allegations that [plaintiff] was subjected to 'unsubstantiated oral reprimands' and 'unnecessary derogatory comments' following her complaint do not rise to the level of [an] 'adverse employment action'").

In rejecting these claims, many courts have mistakenly required proof of a tangible or materially adverse employment action. In *Longstreet v. Illinois Department of Corrections*,¹³⁸ the court threw out an employee's challenge to an alleged retaliatory negative performance evaluation on the grounds that it did not create "tangible job consequences."¹³⁹ In *Rabinovitz v. Pena*,¹⁴⁰ the lowered performance rating actually cost the employee a \$600 bonus, and yet the court reasoned that "loss of a bonus is not an adverse employment action . . . where the employee is not automatically entitled to the bonus."¹⁴¹ In *Weeks v. New York State (Division of Parole)*, a female employee who received notice of a disciplinary action and a "counseling memo" was held not to have stated a prima facie case of gender discrimination despite evidence that male officers did not receive similar notices or memos under similar circumstances.¹⁴² The court reasoned that the plaintiff failed to show what the specific ramifications of the notice or memo would be and how this created a "materially adverse" change in working conditions.¹⁴³ Similarly, in *Davis v. Town of Lake Park, Florida*,¹⁴⁴ the court reasoned that a negative job performance memorandum, which in fact warned that continued misconduct would result in departmental action, did not amount to an adverse employment action, even though the negative review remained in the officer's personnel file, because the officer could not demonstrate that he lost any pay or benefits, nor was there evidence of a foreseeable future economic injury.¹⁴⁵

Such negative reports, reprimands, and threats of termination inherently cause an alteration in the terms and conditions of employment and, where the adverse action is motivated by impermissible discrimination, Title VII mandates that courts hold employers liable. These decisions ignore the emotional harm suffered by an employee who receives unwarranted criticism, an undeserved negative performance evaluation, or who is forced to work under the threat of termination. Working in a stressful environment is no different than working in a sexually harassing environment, which the U.S.

138. 276 F.3d 379 (7th Cir. 2002).

139. *Id.* at 384.

140. 89 F.3d 482 (7th Cir. 1996).

141. *Id.* at 488-89. *But see* *Russell v. Bd. of Trs.*, 243 F.3d 336, 340-41, 345 (7th Cir. 2001) (holding that the district court erroneously ruled that a five-day, unpaid suspension was not "materially adverse" where the suspension was accompanied by entry on formerly spotless record that employee had committed theft of services by falsifying time records).

142. *Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 86-87 (2d Cir. 2001).

143. *Id.*; *see also* *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 692 (8th Cir. 2001) ("[A] negative review is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment.").

144. 245 F.3d 1232 (11th Cir. 2001).

145. *Id.* at 1237-46.

Supreme Court has recognized as an alteration in the terms and conditions of employment.¹⁴⁶ As in the case of transfers or demotions, only agents of the employer are given authority to evaluate work performance. If an employee can establish that the motivation for this type of adverse employment action is race, gender, religion, or national origin, an employee should have recourse against the employer under Title VII.

On the other hand, if the case involves only harassing threats of demotion or termination, then a question is raised as to whether an affirmative defense should be available. Indeed, *Ellerth* itself was a case involving unfulfilled threats of adverse employment action.¹⁴⁷ In *Ellerth*, the Court held that if an employer has in place a mechanism for challenging threats of termination and the employee unreasonably fails to avail herself of that opportunity, then the affirmative defense has been met and the employer will not be held liable for the supervisor's action.¹⁴⁸ However, the employer bears the burden of demonstrating that it took appropriate measures both to prevent and promptly correct the supervisor's misconduct and that the employee acted unreasonably.¹⁴⁹ Where an employer meets the first part of the test, but the employee promptly reports the wrongdoing and thus mitigates the damages, the employer is still liable for the intervening injury.¹⁵⁰

Employers can best protect themselves by training their agents that discrimination will not be tolerated and that such conduct will jeopardize their jobs. Further, they can prevent, or at least significantly mitigate, any damages by having in place an effective mechanism for challenging unwarranted, discriminatory threats and promptly investigating and correcting any illegal misconduct. Under this analysis, the law requires the employer to

146. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

147. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 748 (1998).

148. *Id.* at 765.

149. *See Johnson v. West*, 218 F.3d 725, 731 (7th Cir. 2000) (requiring that a defendant meet both prongs of the affirmative defense). But see David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1288 (2001), which cites statistics indicating that employers prevail regardless of whether plaintiffs exercised reasonable care. Further, employers prevailed on summary judgment in a majority of cases in which they invoked the affirmative defense. *Id.* at 1287-88.

150. In *Ellerth*, the Court stated that Ellerth's claim involved "numerous alleged threats" of termination but it "express[ed] no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment." *Ellerth*, 524 U.S. at 754. The fact that the claim involved only unfulfilled threats did not preclude a finding that the employee was subjected to different terms and conditions of employment. *Id.* at 754. However, because Ellerth had not suffered a tangible employment action, the case was remanded to allow Burlington to prove the two elements of the affirmative defense. *Id.* at 766.

acknowledge the wrongdoing, rather than sweeping it under the rug by simply asserting “no harm, no foul.”

In the context of retaliation claims, employees who know that they may receive reprimands, negative evaluations, or threats of termination, may be deterred from going forward with claims of discrimination or assisting others in doing so. As to both disparate treatment and retaliation claims, questions such as the degree of the negative evaluation, that is, how significant is a change from “highly successful” to “successful,” or whether the evaluation becomes part of the employee’s permanent file, should help determine the amount of emotional distress an employee would reasonably suffer under the circumstances.¹⁵¹ Thus, these issues affect damages, not liability.¹⁵²

C. Temporary Suspensions, Demotions, and Other Adverse Action

Several courts have ruled that temporary suspensions or reprimands that the employer ultimately rectifies are not actionable. In *Weston v. Pennsylvania*, the court held that employer’s placement of two written reprimands in an employee’s personnel file subsequent to the employee’s complaint about sexual harassment did not constitute an adverse employment action because the reprimands were of a temporary nature and would not be permanently affixed to the plaintiff’s employment file.¹⁵³ In *Stewart v. Evans*,¹⁵⁴ the court held that an attempt to obstruct a federal employee’s award nomination was not an adverse employment action because the employee eventually received the award.¹⁵⁵ More broadly, the court stated that mere delay in obtaining a position should not be viewed as an alteration of the terms, conditions, or privileges of employment contemplated by Title VII.¹⁵⁶ In *Dobbs-Weinstein*

151. For example, in *Spears v. Missouri Department of Corrections & Human Resources*, 210 F.3d 850 (8th Cir. 2000), the court held that a performance evaluation that declined from “highly successful” to “successful” was not an adverse employment action because there was “no evidence that the Department subsequently used the evaluation to [the plaintiff’s] detriment.” *Id.* at 853-54. However, the plaintiff contended that the evaluation caused her emotional distress because it “‘demeaned her in the eyes of coworkers.’” *Id.* at 853-54.

152. *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997) (finding that the government’s argument that an alleged retaliatory, negative job reference from a former employer is not actionable because the prospective employer would not have hired plaintiff regardless of the negative job reference “fail[ed] to recognize the distinction between a violation and the availability of remedies. . . . [D]issemination of the adverse job reference violated Title VII because it was a ‘personnel action’ motivated by retaliatory animus. That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability.”).

153. *Weston v. Pennsylvania*, 251 F.3d 420, 431 (3d Cir. 2001).

154. 275 F.3d 1126 (D.C. Cir. 2002).

155. *Id.* at 1135.

156. *Id.* at 1135-36.

v. *Vanderbilt University*,¹⁵⁷ the court held that a dean's discriminatory decision to oppose a departmental tenure recommendation did not constitute an adverse employment action where the faculty member had recourse to an internal grievance process and was given tenure from the date she originally should have received it absent the dean's misconduct.¹⁵⁸ Although the plaintiff received no pay for three months, the court nonetheless found that the reinstatement with back pay and benefits kept the original discriminatory decision from being an adverse employment decision.¹⁵⁹ It reasoned that interlocutory decisions, even if they cause emotional distress, are not actionable under Title VII provided they do not affect the ultimate outcome.¹⁶⁰

These decisions ignore the 1991 Amendment to Title VII, which created a damage remedy in order to compensate plaintiffs for the emotional harm caused by discriminatory or retaliatory action, even in the absence of economic loss.¹⁶¹ Further, in cases where suspensions are without pay but the employee eventually appeals and is reimbursed, a finding that the employee has suffered no adverse action demonstrates a cruel indifference to the reality that some workers "may be living from paycheck to paycheck," and thus, the stress and emotional injury is far from trivial or *de minimis*.¹⁶²

Contrary to these decisions, the Seventh Circuit, in *Molnar v. Booth*,¹⁶³ recognized that allowing a supervisor to demote an employee with impunity, as long as the decision is later reversed and the employee is returned or restored to her former position, ignores the intervening harm and sends the

157. 185 F.3d 542 (6th Cir. 1999).

158. *Id.* at 545.

159. *Id.*

160. *Id.* at 545-46; see also *White v. Burlington N. & Santa Fe Ry.*, 310 F.3d 443, 453-54 (6th Cir. 2002) (holding that a thirty-seven-day suspension without pay right before Christmas was not an adverse employment action where the employee appealed the decision and was reinstated with backpay, because "[w]hile emotional injuries may be affected by the season, it does not make the suspension a sufficiently adverse employment action"), *vacated pending reh'g en banc*, 321 F.3d 1203 (6th Cir. 2003); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1555 (D.C. Cir. 1997) (citing decisions from the Fourth and Fifth Circuits holding that "interlocutory or mediate decisions having no immediate effect upon employment . . . were not intended to fall within the direct proscriptions of . . . Title VII") (quoting *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (alterations in original)).

161. See *supra* notes 16-17 and accompanying text.

162. See *White*, 310 F.3d at 458-59 (Clay, J., dissenting) ("Suddenly, Plaintiff had no income with which to pay her bills, and was left in limbo to await a determination as to her future at the railroad"). The dissent in *White* argued that reimbursement affects damages, but should "not [be] dispositive of whether an adverse employment action has occurred." *Id.* at 459. Note that judgment has been vacated pending en banc review. *White v. Burlington N. & Santa Fe Ry.*, 321 F.3d 1203 (6th Cir. 2003).

163. 229 F.3d 593 (7th Cir. 2000).

message to supervisors that they can harass employees without consequence.¹⁶⁴ Thus, even though a school principal's negative evaluation, which could have ended the plaintiff's teaching career, was reversed six months later by the local school board, the Seventh Circuit reasoned that the teacher was entitled to recover damages for the emotional injury she suffered in the intervening six months as she tried to get the decision reversed.¹⁶⁵

Clearly, in the context of retaliation claims, employees might be deterred from exercising their statutory rights if they knew that going forward could result in temporary suspensions or demotions. The knowledge that one's rights may eventually be vindicated and a position restored or a name cleared provides little solace to the employee who wishes to avoid the stress and turmoil such temporary adverse action can cause. If the employer acts promptly to correct the wrongdoing, it can limit damages, but courts should not ignore the fact that a Title VII violation has occurred, and an employee has been injured.

The notion that "interlocutory" decisions are not actionable absent some tangible or ultimate decision is contrary to the Supreme Court's decision in *Robinson v. Shell Oil Co.*¹⁶⁶ In *Robinson*, an ex-employee's only complaint was that his former employer provided a negative reference regarding his job performance.¹⁶⁷ By definition this cannot constitute an ultimate employment action because the former employer has no authority to make a binding employment decision regarding a nonemployee. However, the holding in *Robinson* was not conditioned on the prospective employer making an ultimate employment decision not to hire — it was the wrongdoing of the former employer, even though it consisted only of a negative reference, which the Court considered actionable.¹⁶⁸ If the prospective employer in fact hires the plaintiff, damages in any significant amount will be difficult to prove.¹⁶⁹

164. *Id.* at 600-01.

165. *Id.*; see also *Jin v. Metro. Life Ins. Co.*, 295 F.3d 335, 351 (2d Cir. 2002) (finding that an employee should be able to recover where pay is temporarily suspended, even though back wages are eventually paid, because loss of an unexpected steady income can have a serious impact on an employee).

166. See *supra* notes 87-90 and accompanying text.

167. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997).

168. *Id.* at 339-40, 345-46.

169. Note that an EEOC Enforcement Guidance states that compensatory damages require some manifestation of emotional harm: "The existence, nature, and severity of emotional harm must be proved." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER § 102 OF THE CIVIL RIGHTS ACT OF 1991 § II(A)(2) (1992), available at <http://www.eeoc.gov/policy/docs/damages.html> A bruised ego caused by a negative reference that did not influence any hiring decision is unlikely to trigger a large award.

The key point, however, is that mediate decisions trigger Title VII liability, and a court should discuss the issues regarding extent of the injury at the damages phase, not the liability phase.

D. Changes in Working Conditions: Schedules, Workload, and Support

Several courts have ruled that employees who have been subjected to different work schedules, given additional work assignments, or denied secretarial or other support services have not suffered an adverse employment action, either in the context of a disparate treatment or a retaliation case. For example, in *Markel v. Board of Regents*,¹⁷⁰ an employee claimed that she was denied better equipment and resources to travel, and that the employer had taken certain accounts from her, which caused her to miss bonuses.¹⁷¹ The court rejected her claims, reasoning that the loss of support services, standing alone, is not actionable retaliation.¹⁷² Similarly, in *Jacob-Mua v. Veneman*,¹⁷³ the court denied the retaliation complaint of an employee who alleged that “she was given work assignments not commensurate with her skills, abilities, and job functions, given inferior equipment by her supervisors . . . and denied timely promotion.”¹⁷⁴ In rejecting this claim, the court focused on the fact that, overall, the employee’s salary increased during the course of her employment, and she was eventually given permission to hire an intern to assist her in performing the additional work duties.¹⁷⁵ Other courts have held that denial of secretarial support,¹⁷⁶ alteration of work schedules,¹⁷⁷ or the

170. 276 F.3d 906 (7th Cir. 2002).

171. *Id.* at 911.

172. *Id.* at 911-12. Compare the Seventh Circuit’s 1996 decision in *Knox v. Indiana*, 93 F.3d 1327 (7th Cir. 1996), where the court stated that depriving a person of previously available support services, such as secretarial help or a desktop computer, constitutes an adverse employment action. *Id.* at 1334.

173. 289 F.3d 517 (8th Cir. 2002).

174. *Id.* at 522.

175. *Id.*

176. *Gorence v. Eagle Food Ctrs., Inc.*, 242 F.3d 759, 766 (7th Cir. 2001) (holding that loss of secretarial support, even when accompanied by a title change, does not constitute adverse employment action where such does not involve the loss of pay or benefits).

177. *Grube v. Lau Indus.*, 257 F.3d 723, 729 (7th Cir. 2001) (finding that the plaintiff, who was assigned to the night shift after working day shift for twenty years, failed to state an adverse employment action, because “Title VII simply was never intended to be used as a vehicle for an employee to complain about the hours she is scheduled to work or the effect those hours have upon the time an employee spends with family members”); *Watts v. Kroger Co.*, 170 F.3d 505, 511-12 (5th Cir. 1999) (finding that an employee whose work schedule was changed after she filed a complaint about her supervisor could not allege retaliation where the change in schedule did not affect her salary); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994) (stating that a transfer to another shift was not an adverse employment action).

assignment of menial or degrading tasks¹⁷⁸ are not actionable. Contrary to the text and spirit of Title VII, these decisions ignore both the employer's wrongdoing as well as the emotional injury that the victim of discrimination suffers.

Almost by definition, when an employer changes an employee's working conditions for discriminatory or retaliatory reasons, an employee has been wrongfully subjected to different terms and conditions of employment. Characterizing such changes as *de minimis* or a minor inconvenience, particularly at the summary judgment stage, denies the employee the opportunity to prove how these changes have affected her ability to perform her job. The U.S. Supreme Court, in its sexual harassment cases, recognized that interference with work performance, and an employer's attempts to do so, is a core concern of Title VII.¹⁷⁹ Following the Supreme Court's guidance, several lower courts have recognized sexual harassment claims where an employee asserted unreasonable interference with work performance.¹⁸⁰

178. See, e.g., *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000) (holding that an assignment to window-washing task in retaliation for employee's complaint about supervisor's alleged sexual harassment was nothing more than "mere inconvenience or an alteration of job responsibilities" and cannot be characterized as an adverse employment action, despite employee's assertion that this assignment was "degrading and punitive") (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)); *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1060 n.10 (5th Cir. 1998) (noting that allegations that employer required employee "to perform manual tasks, plac[ed] him in a smaller office, and reduc[ed] the number of employees he supervised" is not actionable because this conduct "does not constitute an 'ultimate employment decision'").

179. See *supra* notes 67-68 and accompanying text.

180. *LaDay v. Catalyst Tech., Inc.*, 302 F.3d 474, 482-83 (5th Cir. 2002) (allowing the plaintiff to survive summary judgment by alleging that supervisor's conduct in making obnoxious comments about his sexuality, and in physically touching employee's anus on one occasion caused him physical and psychological difficulties that impaired his ability to work); *Greene v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 656 (5th Cir. 2002) (finding that a rational jury could determine that the harasser's "conduct was sufficiently severe or pervasive to create a hostile work environment" where actions "interfered with [employee's] work performance" and caused her to suffer "severe psychological effects"); *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 75-76 (2d Cir. 2001) (holding that the district court erred in granting summary judgment where plaintiff alleged that supervisor "'grabbed' and 'placed his hand on [her] hand' on a 'daily' basis," making it almost impossible for plaintiff to perform her work) (alteration in original); *O'Rourke v. City of Providence*, 235 F.3d 713, 729-30 (1st Cir. 2001) (finding that harassing conduct, which consists of work-sabotaging pranks that "undermines her ability to succeed at her job, those acts should be considered along with overtly sexually abusive conduct in assessing a hostile work environment claim"); *Hathaway v. Runyon*, 132 F.3d 1214, 1223 (8th Cir. 1997) (finding it sufficient that the plaintiff "credibly testified that she felt afraid, intimidated, and anxious, and that those feelings had a detrimental impact on her psychological well-being and on her ability to perform her work. . . . That she was still able to complete her assigned tasks does not undermine the jury's finding that a reasonable person subjected to this

Where there is evidence that other, similarly situated employees are not subject to these disfavored conditions, courts should not tolerate these forms of discriminatory action. Indeed, in characterizing the types of tangible employment actions that trigger absolute vicarious liability in the context of sexual harassment claims, the *Ellerth-Faragher* Court included discriminatory "work assignments."¹⁸¹ The goal of Title VII was to create equal employment opportunity in the workplace. When an employer bases his decision regarding work shifts, support staff, and job assignments on a person's gender, race, or national origin, that employer has violated the letter and spirit of the antidiscrimination law.

In the case of retaliation, the sole question is whether a reasonable employee would feel deterred from bringing an action or supporting another in pursuing claims under Title VII because of the employer's conduct.¹⁸² If the change in working conditions is truly minor, such that it would not dissuade a reasonable employee from coming forward, that would provide a basis for dismissing a case at the summary judgment stage. In the cases discussed above, however, it can reasonably be argued that being assigned menial or degrading tasks, being denied secretarial support, having one's hours changed, or being assigned extra work would chill most employees from coming forward, either on their own behalf or on behalf of others.¹⁸³

E. Company Tolerated Harassment by Coworkers and Supervisors

The question of when harassment should be actionable is a little more complex. Initially, if the harassment takes the forms mentioned above, i.e., transfers, negative evaluations, or changes in working conditions, the analysis set forth in earlier sections should apply. On the other hand, where the harassment consists solely of humiliating or harassing verbal or physical

conduct "would find . . . harassment so altered working conditions as to make it more difficult to do the job.") (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

181. "[T]here is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown." *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998).

182. See *supra* Part III; see also *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) (holding that the elimination of a program, change in employee's start time, and changes in standard procedures constituted adverse retaliatory action).

183. See also *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 787-88 (3d Cir. 1998) (finding that a litigant suing under the ADA's antiretaliation provision could pursue a claim that his work schedule was changed in retaliation for his having engaged in EEOC activity, because "[n]othing in the ADA suggests that employers are prohibited from taking only those retaliatory actions that impose an 'extreme hardship'").

abuse, the Supreme Court decisions regarding sexual harassment, which are interpreting the same disparate treatment language, should govern. As previously discussed, the Supreme Court has ruled that an employee who is forced to work in a harassing environment, whether by coworkers or by an employer, may have an actionable Title VII claim because that person has been subjected to different terms and conditions of employment.¹⁸⁴ However, the Supreme Court has also made it clear that Title VII does not impose a code of civility in the workplace, and that such claims must be sufficiently severe or pervasive so as to truly alter the terms and conditions of employment. In *Oncale v. Sundowner Offshore Services, Inc.*,¹⁸⁵ the Court cautioned that Title VII's prohibition does not require "asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment."¹⁸⁶ Although the case arose in the context of same-sex harassment, where establishing gender as a motivating factor is more difficult, Justice Scalia made a broader statement, warning courts and juries "to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."¹⁸⁷ Similarly, in *Faragher v. City of Boca Raton*,¹⁸⁸ the Court mandated that a meritorious claim of hostile work environment required the conduct be so "extreme [as] to amount to a change in the terms and conditions of employment."¹⁸⁹ Arguably this same high bar will apply whenever the adverse employment action consists of harassment, whether motivated by gender, race, religion, or national origin.

What is problematic, however, is the extension of the "severe or pervasive" requirement to retaliation cases where courts are not interpreting the terms and conditions language, but should simply be asking whether the conduct is such as would chill the reasonable employee from asserting claims under Title VII. The EEOC Compliance Manual explains that where an employee is kept "under surveillance" for filing a Title VII charge, actionable retaliation has occurred. Similarly, where a supervisor regularly invites all employees to lunch, but excludes the complaining party, "this would constitute unlawful retaliation since it could reasonably deter [the complaining party] or others from engaging in protected activity."¹⁹⁰ It appears that almost all of the circuit

184. See *supra* notes 61-63 and accompanying text.

185. 523 U.S. 75 (1998).

186. *Id.* at 81.

187. *Id.* at 82.

188. 524 U.S. 775 (1998).

189. *Id.* at 788.

190. COMPLIANCE MANUAL, *supra* note 6, § 8-II(D)(3), at 8-14. The EEOC cites *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), to support its interpretation: it "accords with the primary

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courts that have addressed the issue have concluded that mere harassing behavior is not actionable retaliation unless the harassing conduct itself is so severe as to be actionable harassment under the disparate treatment standard.¹⁹¹ One court has held that “[c]onditions of employment designed to harass and humiliate an employee because she is a member of [a] protected class[] may constitute an adverse employment action” *only if* the harassment is “severe or pervasive.”¹⁹²

It should be clear that harassment may deter employees from exercising their statutory rights even if it is *not* “severe” or “pervasive.” If the harassment is truly minor, a court should not find it sufficient to chill speech. However, a rigid application of a “severity” or “pervasive” rule confounds the discriminatory treatment provision of Title VII, where courts must interpret what is a change in terms and conditions of employment, with the antiretaliation provision, which flatly bars all retaliatory discrimination. Nonetheless, many courts have found that if the harassment does not “materially” alter terms and conditions of employment, it cannot provide a basis for a retaliation claim. Thus, courts have not permitted employees who are subjected to threats and harassing phone calls,¹⁹³ or who are ostracized by the supervisor and coworkers,¹⁹⁴ or whose work is monitored more closely¹⁹⁵

purpose of the anti-retaliation provisions, which is to ‘[m]aintain[] unfettered access to statutory remedial mechanisms.’” *Id.* § 8-II(D), at 8-15.

191. *E.g.*, *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1262-64 (10th Cir. 1998); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994).

192. *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 466 (7th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002). Note that the certiorari petition specifically raised the question of whether a retaliation claim under Title VII “require[s] [the] same ‘adverse employment action’ needed to establish discrimination with respect to” terms and conditions of employment. *Hilt Dyson v. City of Chicago*, 70 U.S.L.W. 3762 (U.S. June 11, 2002) (No. 01-1758). Unfortunately, the Supreme Court failed to resolve this statutory conundrum.

193. *Rizzo v. Sheahan*, 266 F.3d 705, 717-18 (7th Cir. 2001).

194. *Gagnon v. Sprint Corp.*, 284 F.3d 839, 850 (8th Cir. 2002) (declaring that “[i]t is well-settled in this circuit that ostracism and rudeness by supervisors and co-workers do[es] not rise to the level of an adverse employment action” and, although employee alleged he was ignored by supervisor, and “it became difficult for him to function as a member of [the] team, [there was] no evidence that this behavior had any impact on his job title, salary, benefits, or any other material aspect of his employment”); *Stutler v. Ill. Dep’t of Corr.*, 263 F.3d 698, 703-04 (7th Cir. 2001) (requiring that “[r]etaliatory harassment . . . [must be] severe enough to cause a significant change in [employee’s] status” because “ostracism by co-workers that [does] not result in material harm . . . [is] not enough”; further, harassment by supervisor that consisted only of threats that were never fulfilled, offensive statements, and relocation to unfinished area did not cumulatively constitute material harm as is required to state a claim of retaliation); *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 84 (2d Cir. 2001) (finding that allegations that employee’s

to proceed with their claims.

In addition, the Sixth Circuit has not only borrowed the “severe or pervasive” requirement of section 703, but also the principles of vicarious liability and the affirmative defense set forth in *Ellerth* and *Faragher*.¹⁹⁶ The court reasoned that “[u]nder agency principles, retaliatory harassment does not, in and of itself, constitute a ‘tangible employment action.’ Therefore, an employer is entitled to the same affirmative defense for retaliatory harassment that it is entitled to for sexual harassment”¹⁹⁷

Borrowing from the sexual harassment cases, it makes sense for courts to distinguish between harassment by coworkers, where there is no evidence that the employer was even aware of the action, and harassment by supervisors, where agency principles should dictate vicarious liability. Some courts, however, have ruled that even where an employer is made aware of harassment by coworkers and fails to take any action to correct the behavior, the employer is not liable.¹⁹⁸ Indeed, in two cases from the Fourth Circuit, the

supervisor and several coworkers formed a clique and made her feel “‘out of the loop’ . . . [fell] well short of the sort of ‘materially adverse change in the terms and conditions of employment’” that is actionable under Title VII (quoting *Richardson*, 180 F.3d at 446); *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 691-92 (8th Cir. 2001) (finding that the defendant’s “refusal to speak to [employee], . . . his failure to inform her of mandatory meetings,” and his issuance of a memorandum of deficiency did not constitute adverse employment action because none of these actions ever resulted in a material employment disadvantage); *Bell v. EPA*, 232 F.3d 546, 555 (7th Cir. 2000) (finding that refusal by a member of promotion selection panel to talk to employee and his canceling of a conference that employee had scheduled would not constitute adverse employment action since no facts “indicated a material change in the terms and conditions of [plaintiff’s] employment”); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (stating that retaliation claims are restricted to ultimate employment actions, not simple hostility, disrespect, or ostracism).

195. *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857 (10th Cir. 2000) (holding that defendants’ conduct in moving employee’s desk, supervising her calls and acting aloof towards her did not amount to adverse employment actions because none of the conduct affected her “employment status”).

196. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000).

197. *Id.* (citation omitted).

198. *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 271-72 (4th Cir. 2001) (finding that coworkers’ failure to act politely or speak to employee was not an adverse employment action where there was no claim that employer actually instructed coworkers to snub the plaintiff; the court stated that employer’s failure to correct or reprimand coworker behavior is not actionable, and, even where an employer has instructed employees “to ignore and spy on an employee,” there is no adverse employment action) (quoting *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)). Compare *Ray v. Henderson*, 217 F.3d 1234, 1243-45 (9th Cir. 2000) (joining the Second, Seventh, and Tenth Circuits, concluding that a retaliatory-based hostile work environment may be an adverse employment action where employee was subjected to verbal abuse by supervisors, as well as pranks and false accusations of misconduct such that a genuine issue of fact was raised regarding sufficiency of the evidence

employer actually instructed his employees to ignore and to spy on the plaintiff, and yet, the court found no adverse employment action.¹⁹⁹ In another case, the Ninth Circuit simply concluded that an employer cannot force employees to socialize with one another; thus, ostracism, even though triggered by discriminatory or retaliatory motive, cannot constitute an adverse employment action.²⁰⁰ In contrast, in the context of sexual harassment cases, the courts have uniformly held that, where an employer is aware of the harassing conduct of coworkers and yet fails to take prompt corrective action, liability may be imposed.²⁰¹

to establish retaliatory hostile work environment), with *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (finding that demeaning statements made by other employees may meet "adverse" standard), and *Wyatt v. City of Boston*, 35 F.3d 13, 16 (1st Cir. 1994) (per curiam) (finding that toleration of other employee harassment is potentially retaliatory conduct).

199. *Matvia*, 259 F.3d at 271-72; see also *Munday*, 126 F.3d at 241-43 (finding that although an employer's general manager instructed the plaintiff's coworkers to ignore her, spy on her, and report anything to him because he wanted to fire her and although plaintiff was assigned to a route she did not request and was subjected to other work-related incidents of harassment ultimately leading to her departure, "this scenario does not rise to the level of an adverse employment action for Title VII purposes"; absent evidence of any harm to a term, condition, or privilege of employment, the mere conduct of ignoring and spying on employee is not actionable). *Contra Moore v. Kuka Welding Sys.*, 171 F.3d 1073, 1080 (6th Cir. 1999) (holding evidence that plaintiff was isolated from other employees who were instructed not to talk or interact with him supported a jury finding of retaliation).

200. *Brooks v. San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000) (finding that, "[b]ecause an employer cannot force employees to socialize with one another, ostracism suffered at the hands of coworkers cannot constitute an adverse employment action"). But see *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426 (2d Cir. 1999), noting the circuit split as to whether an allegation of a hostile environment based on retaliation can satisfy the adverse employment element in an ADEA case. The court ruled that "unchecked retaliatory coworker harassment, if sufficiently severe, may constitute [an] adverse employment action." *Id.* at 446. If an employer knows about but fails to correct coworker hostility, the employer may be liable for a hostile environment based on retaliatory animus. *Id.* at 446; cf. *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998) (rejecting the position taken in the Fourth, Fifth, and Eighth Circuits, the court joined the First and Seventh Circuits in recognizing that a campaign of retaliatory harassment by coworkers may constitute an adverse employment action under section 704(a)).

201. See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 876 (9th Cir. 2001) (finding that an employer failed to meet its remedial obligations where it merely "conducted a handful of spot checks" but made no real effort to investigate complaint or to threaten serious discipline if conduct continued); *EEOC v. Indiana Bell Tel. Co.*, 256 F.3d 516, 519 (7th Cir. 2001) (finding that an employer could not rely on a collective bargaining agreement to justify its repeated failure to discipline or dismiss employee for sexually harassing fellow female employees, even if it might have incurred back pay and other costs for doing so); *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 988 (8th Cir. 1999) (jury could properly conclude that employer failed to take prompt action to correct sexual harassment by coworker where it waited two months before taking effective action or bringing complaints to director's attention).

If the supervisor engages in harassing behavior, however, the sexual harassment cases dictate that courts should impose vicarious liability, although, in the absence of a tangible employment action, an employer has an affirmative defense.²⁰² The employer may escape liability, but only if it proves that it exercised reasonable care to prevent and promptly correct any harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities.²⁰³ In contrast, in the context of a retaliation claim, the employer is on “notice” that an initial charge of discrimination is filed against it and, thus, is in a better position to prevent retaliatory conduct from occurring. Further, the affirmative defense is not necessary to encourage employees to mitigate damages by coming forward and using the employer’s enforcement mechanism — the employee has already done so. Thus, at least in the context of retaliatory harassment by a supervisor, the absolute vicarious liability rule should govern.²⁰⁴

F. Nonemployment Related Adverse Action

The distinction between disparate treatment and retaliation cases is very significant here. Because disparate treatment cases require discrimination with regard to terms and conditions of employment, an employer who takes action outside of the employment context is arguably immune from a Title VII disparate treatment claim. In contrast, however, some courts have recognized that the retaliation provision is broad enough to cover actions that are not employment related.²⁰⁵ Many courts, however, have ignored the clear text of

202. See *supra* note 36 and accompanying text.

203. See *supra* note 36 and accompanying text.

204. *Contra* Linda M. Glover, Comment, *Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Toward Justice*, 38 HOUS. L. REV. 577, 581 n.21 (2001) (arguing that the *Ellerth* affirmative defense should be available in retaliatory harassment cases).

205. See, e.g., *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 733-34 (7th Cir. 2002) (finding that noneconomic forms of retaliation, as well as adverse actions unrelated to employment are actionable, “includ[ing] non-employment activities such as brick-throwing, tire-slashing or other unfortunate acts . . . [provided] the adverse act . . . occur[ed] because of the employee’s exercise of protected rights”); *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001) (ruling that filing false police reports would violate the retaliation provision, even though it found that because the report was true, the claim was not actionable); *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 892 (7th Cir. 1996) (finding that “[a] current employee can sue for retaliatory acts that, but for the fact that they are committed by his employer, are unrelated to employment as such,” and listing several cases finding threats of violence and tort civil actions to be adverse actions); *Berry v. Stevenson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (holding that malicious prosecution action against a former employee constitutes an adverse employment action for purposes of retaliation claim); *Passer v. Am. Chem. Soc’y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding “illegal retaliation in employer conduct that could not be described strictly as an ‘employment action’”).

Title VII, and instead required that the retaliatory conduct be somehow related to the employment relationship.²⁰⁶

Because the retaliation provision addresses any discrimination that might deter a reasonable person from going forward or from participating in another's discrimination claim, the fact that the discriminatory action is not employment-related should be irrelevant. Support for this interpretation is found in the Supreme Court's decision in *Bill Johnson's Restaurant, Inc., v. NLRB*.²⁰⁷ The Court held that an employer who filed an alleged retaliatory lawsuit against an employee violated the retaliation provision of the National Labor Relations Act,²⁰⁸ because a lawsuit "may be used by an employer as a powerful instrument of coercion or retaliation."²⁰⁹ Provided that the lawsuit is "baseless" and brought "with the intent of retaliating against an employee for the exercise of protected rights, it should be actionable."²¹⁰

V. Conclusion

The trend in the lower courts to dismiss claims of disparate treatment and retaliation based on an insufficient demonstration of harm is contrary to the text as well as the goals and purposes of Title VII. An examination of the facts in these recent cases demonstrates that courts are impermissibly ignoring the real injury that discrimination victims suffer and are instead manufacturing requirements that employees show materially adverse, ultimate, or tangible employment actions. The courts have similarly failed to distinguish retaliation cases where an even more liberal approach is mandated to effectuate Congress' concern that employees who are victims of discrimination, or who

206. See *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 532-33 (5th Cir. 2003) (finding that "an employer's filing of a counterclaim cannot support a retaliation claim in the Fifth Circuit," because such is not an ultimate employment decision); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 865 (8th Cir. 1997) (finding that employer's alleged obstruction of employee's studies for an M.B.A. and his attempt to prevent employee from living with his direct supervisor was not an adverse employment action because "[n]either the MBA classes nor the living arrangement with his supervisor [were] benefits of his employment with Northwest"); *Nelson v. Upsala Coll.*, 51 F.3d 383, 387 (3d Cir. 1995) ("Although '[t]he connection with employment need not necessarily be direct,' it does not further the purpose of Title VII to apply section 704 to conduct unrelated to an employment relationship.") (quoting *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980)) (alteration in original) (citation omitted).

207. 461 U.S. 731 (1983).

208. 29 U.S.C. § 158(a) (2000).

209. *Bill Johnson's*, 461 U.S. at 740.

210. *Id.* at 744. Note that the NLRA's antiretaliation provision was the model for Title VII's antiretaliation provision. See *Equal Employment Opportunity: Hearings on H.R. 405 Before the Comm. on Educ. & Labor, Gen. Subcomm. on Labor*, 88th Cong. 83-84 (1963).

seek to aid others in pursuing their claims, will not be chilled in coming forward. The courts have adopted what is in essence a “no harm, no foul” rule, which shifts attention away from the employer’s discriminatory action or retaliatory treatment, contrary to both the statute and earlier Supreme Court precedent. These decisions also ignore the Civil Rights Act of 1991, the purpose of which was to guarantee that emotional injury is compensable under Title VII. Congress’ goal of affording true equal opportunity in the workplace to all employees cannot be achieved as long as litigants are made to jump through judge-made obstacles that close the doors to the courthouse without affording employees the opportunity to prove injury caused by discriminatory wrongdoing.

